Supreme Court, U.S.
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No. 05-___ 04171

IN THE

Supreme Court of the United States

SARKES TARZIAN, INC.,

Petitioner,

v.

U.S. TRUST COMPANY OF FLORIDA SAVINGS BANK, as Personal Representative of the Estate of Mary Tarzian,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit, in conflict with other circuits, violated Rule 50 of the Federal Rules of Civil Procedure and the Seventh Amendment by holding that a jury cannot disbelieve the testimony of interested witnesses that the circuit viewed as "unrebutted."

2. Whether the Seventh Circuit, sitting in a diversity case, violated principles of federalism by disregarding clearly established state law on the apparent authority of an attorney to bind his client to an oral contract, thereby creating its own law in this important area of commercial transactions.

RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. There is no parent company of Petitioner Sarkes Tarzian, Inc. or publicly held company owning 10% or more of Petitioner Sarkes Tarzian, Inc. stock.

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SARKES TARZIAN, INC.,

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v.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sarkes Tarzian, Inc. ("STI") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 397 F.3d 577 and reproduced in the appendix hereto ("App.") at 1a. The Order of the United States District Court for the Southern District of Indiana ("District Court") denying summary judgment is unreported and is reproduced at App. 23a. The judgment on the jury verdict entered by the District Court is unreported and is reproduced at App. 21a. The

Order of the District Court denying the motion to set aside the jury's verdict is unreported and is reproduced at App. 18a.

JURISDICTION

The Seventh Circuit entered judgment in this case on February 14, 2005, App. 1a, and denied STI's timely petition for rehearing on March 21, 2005. App. 40a. The jurisdiction of the District Court was based on diversity of citizenship. 28 U.S.C. § 1332(a)(1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

Rule 50 of the Federal Rules of Civil Procedure provides in relevant part:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1).

INTRODUCTION

This case raises important and recurring federal questions concerning the province of the jury in a civil trial, the importance of applying state substantive law in diversity cases, and the need for consistency and predictability of outcomes in the federal system. Because jury trials in federal courts are becoming increasingly rare, it is important for this Court to delineate clearly the roles of judges and juries. In *Reeves* v. *Sanderson Plumbing Products Inc.*, 530 U.S. 133, 150-51 (2000), this Court held that a trial court, in deciding a motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure, should review all of the evidence in the record, including the defendant's evidence, but must draw all reasonable inferences in favor of the plaintiff and "may not make credibility determinations or weigh the evidence." While the Court noted that a trial court should give credence to "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from *disinterested* witnesses," it did not suggest that the same rule should apply to *interested* witnesses. *Id.* at 151 (emphasis added).

In this case, the Seventh Circuit overturned a jury verdict based on the testimony of interested witnesses, who claimed that the private conversations between the principal and its attorney did not permit that attorney to bind respondent U.S. Trust Savings Bank of Florida ("U.S. Trust") to a contract he had negotiated with petitioner STI. The Seventh Circuit characterized the testimony as "unrebutted" and held that a jury lacks the right "'to ignore or discredit the testimony of unimpeached witnesses so far as they testify as to facts.'" App. 13a.

By ruling in this case that the jury was required to believe the testimony of interested witnesses, the Seventh Circuit deepened a split between the circuits concerning "unrebutted" testimony. The Second, Third, Fifth, Eighth, Eleventh and Federal Circuits have categorically held that a

jury is not required to believe the unrebutted testimony of interested witnesses. The First, Ninth, Tenth and D.C. Circuits have held that a jury is not required to believe the testimony of interested witnesses in circumstances similar to those presented here. In this case, the Seventh Circuit joined the Fourth Circuit in holding that a jury is required to believe such testimony—and the result was to set aside the jury verdict, which was based on the jury's own credibility determinations and weighing of the evidence.

This case presents an ideal opportunity to resolve this split in the circuits on this important federal issue and to clarify the role of the jury in determining the credibility of interested witnesses. This case also provides an opportunity to address the extent to which a plaintiff can satisfy its evidentiary burden through indirect evidence and the impact of testimony by interested witnesses with the ability to describe events in which they alone participated. In addition, this case provides an opportunity to distinguish the role of the trial judge (who denied the Rule 50 motion in this case) from that of the appellate court (which granted it), for, as this Court has explained, "[t]rial judges have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record." *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1990) (internal citations and quotation marks omitted).

The Seventh and Fourth Circuits have used the phrases "unrebutted evidence" or "uncontradicted evidence" to describe an array of factual records and, in some instances such as in this case, to take credibility issues away from juries. By granting the writ, this Court would be able to instruct lower courts to distinguish among three categories of cases: (1) those in which opposing witnesses directly contradict each other (the proverbial "he said/she said" examples); (2) those in which one side's witnesses describe events and neither other record evidence nor any other basis for disbelieving the witnesses' testimony, such as self-

interest, exists (true "unrebutted" or "uncontradicted evidence" cases); and (3) those in which a witness testifies to events, to which the opponent was not a direct participant and cannot therefore "directly contradict" (such as a private conversation between two individuals on the same side of the case), but other evidence is submitted that discredits or raises questions about the testimony.

The Seventh and the Fourth Circuit have been too quick to use the phrase "unrebutted evidence" as a technique of imposing judicial findings in lieu of respecting the credibility determinations made by jurors. Lower courts are in need of this Court's guidance on this issue. This issue raises important concerns about the administration of justice, the application of Rule 50, and the right to a jury trial.

This case also presents an occasion to emphasize the obligation of federal courts to apply state substantive law in diversity cases. New York law, which governed this case, is clear that (a) a principal who sends an agent to negotiate on his behalf vests that agent with apparent authority; (b) the scope of that apparent authority may be based on the authorized statements of the agent; and (c) the principal bears the risk of any failure by the agent to disclose any limitations on the scope of his authority. U.S. Trust's attorney made numerous statements suggesting that he had authority to bind it to a contract, and U.S. Trust admitted that a number of those statements were authorized. Yet, the trial court rejected STI's request that it instruct the jury on apparent authority because STI did not have any direct interaction with U.S. Trust. In affirming that decision, the Seventh Circuit misconstrued New York common law and violated the principles of federalism articulated by this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938)—which bars a federal court sitting in diversity from substituting its own judgment about the wisdom of a particular rule for the governing substantive law of the appropriate state.

By imposing its own view on the law of apparent authority

in this case, the Seventh Circuit undermined an important principle that governs commercial transactions in New York. Contracts involving billions of dollars are negotiated every day by attorneys representing clients in New York. If the parties negotiating those contracts cannot be certain that they will be enforced consistently by federal courts across the country in accordance with clearly established state law, then the certainty and predictability that those transactions require will be seriously compromised.

STATEMENT OF THE CASE

This case involves the breach of an oral contract by U.S. Trust to sell certain stock ("Stock") to STI. The oral contract was negotiated in a single day in New York. U.S. Trust sent as its sole representative to the negotiations its attorney, James Pressly ("Pressly"). AA 393, 415, 448, 469 520, 477.[1] At the end of the day-long negotiations, STI made an offer to which Pressly responded by saying "we'll take it" and "we have a deal." AA 272, 288, 296, 316, 394, 416, 437-38, 455-56, 479-80. That night, U.S. Trust received a better offer, and three days later it sold the Stock to another party. AA 327, 457, 458.

District Court Proceedings. STI brought suit in the Southern District of Indiana, where STI is located. At the close of discovery, U.S. Trust moved for summary judgment arguing, *inter alia*, that Pressly lacked authority to enter into a contract on behalf of U.S. Trust. In an opinion dated February 28, 2002, the District Court denied the motion on the ground that there were genuine issues of material fact with respect to Pressly's authority. App. 23a.

Trial commenced before a jury on January 28, 2003. STI contended that Pressly had actual and apparent authority. To show that Pressly had *actual* authority, STI submitted evidence that U.S. Trust had authorized him to state that he

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[1] "AA" refers to the Appellee's Appendix submitted to the Seventh Circuit by STI.

was there "to decisively make a deal today"; that he was "authorized" to make an offer; and that he was authorized to state "we'll take it" in response to STI's counter-offer. AA 274, 286, 288, 394, 416, 449, 454, 455-56, 478, 479-80, 528, 530. Moreover, STI's witnesses testified without contradiction that Pressly told them not to worry that U.S. Trust was not at the meeting, and in response to STI's question "do we have a deal," Pressly replied: "Yes, we have a deal." AA 393, 403, 415, 416, 449, 478, 479.

To show that Pressly had *apparent* authority, STI introduced evidence that Pressly had represented U.S. Trust in negotiations with STI and others for more than six months; Pressly had made all the major decisions regarding the Stock; and Pressly had been responsible for U.S. Trust being named personal representative of the estate that owned the Stock. AA 254, 412, 444, 448, 458, 465, 467, 468, 475, 527-28, 531. STI also pointed to the evidence demonstrating Pressly's actual authority, including the statements that he was there "to decisively make a deal today," that he was "authorized" to make an offer and that he said "we'll take it"—all of which were authorized by U.S. Trust. AA 274, 286, 288, 416, 449, 454, 455-56, 478, 479-80, 528, 530. Finally, Pressly admitted on the witness stand that he never stated that he was not authorized to bind U.S. Trust. AA 456.

U.S. Trust made a motion for judgment as a matter of law at the close of STI's case, but the District Court denied the motion without opinion, ruling that STI had produced sufficient evidence to enable a jury to find that Pressly had authority to bind U.S. Trust. U.S. Trust then called two of its officers, its CEO and senior vice-president, in its case. Those officers admitted that Pressly was authorized to negotiate a deal, but they claimed that he was not authorized to bind U.S. Trust to that deal. They testified that this limitation was expressed in one or more oral conversations with Pressly, but they could not recall the details of those conversations; nor

could they agree with each other about when those conversations occurred. AA 514-15, 518-20, 527. Furthermore, they acknowledged that they had never put any limitation on the terms Pressly could accept. AA 528.

Much of the trial centered on the implication of a statement made by Pressly at the outset of the negotiation that "U.S. Trust is standing by, is fully briefed, and is prepared to sign a definitive purchase and sale contract today if we can negotiate one." AA 273, 393, 403, 415, 449, 478. Under New York law, parties can bind themselves to an oral agreement even if a written agreement is ultimately contemplated,[2] and the jury so found.

At the close of all the evidence, U.S. Trust again renewed its motion for judgment as a matter of law, and the District Court denied it. Even though both sides had submitted preliminary instructions on both actual and apparent authority, the District Court declined to instruct the jury on apparent authority because, in its view, New York law requires "an expression from the principal to the third party indicating the extent of the authority" and STI had not introduced evidence of such a direct expression. AA 538-39. The District Court did instruct the jury on actual authority. AA 541.

Finding that U.S. Trust breached its contract with STI, the jury returned a verdict for STI and awarded damages. App. 42a. Because it had only been instructed on actual authority, the jury necessarily found that Pressly had actual authority to bind U.S. Trust to the contract with STI. The jury also necessarily found that the testimony of U.S. Trust's officers

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[2] *Tymon* v. *Linoki*, 213 N.E.2d 661, 664 (N.Y. 1965); *City Univ. of New York* v. *Finalco, Inc.*, 514 N.Y.S.2d 244, 246 (N.Y. App. Div. 1987); *accord R.G. Group, Inc.* v. *Horn & Hardart Co.*, 751 F.2d 69, 74 (2d Cir. 1984); *V'Soske* v. *Barwick*, 404 F.2d 495, 499 (2d Cir. 1968); *Demario* v. *Coppola*, 10 F. Supp. 2d 213, 219-20 (E.D.N.Y. 1998) (Weinstein, J.); *Teachers Ins. & Annuity Ass'n* v. *Tribune Co.*, 670 F. Supp. 491, 498 (S.D.N.Y. 1987) (Leval, J.).

denying that Pressly had actual authority was not credible and had been rebutted by other evidence.

U.S. Trust again renewed its Rule 50 motion for judgment as a matter of law and argued the insufficiency of the evidence of actual authority. The District Court denied U.S. Trust's motion, finding once again that "there was sufficient evidence to support the jury's finding that Pressly had actual authority" to bind U.S. Trust. App. 19a. U.S. Trust filed a timely notice of appeal on July 21, 2003.

Seventh Circuit Decision. On February 14, 2005, the Seventh Circuit overturned the jury's verdict by reversing the District Court's denial of U.S. Trust's Rule 50 motion for judgment as a matter of law. App. 1a.

On the actual authority issue, the Seventh Circuit held that the testimony of U.S. Trust's officers was dispositive. In the circuit's view, the testimony that the officers had told Pressly that he had limited actual authority "stood unrebutted." App. 13a. The Seventh Circuit squarely rejected STI's argument that the jury—which was charged with weighing the credibility of witnesses—was permitted to disbelieve the testimony of U.S. Trust's witnesses because they had an obvious interest in denying that Pressly had the authority to make the deal, which turned out not to be as lucrative as the subsequent offer. Instead, the Seventh Circuit reaffirmed its prior case law holding that a jury lacks the right " 'to ignore or discredit the testimony of unimpeached witnesses so far as they testify as to facts.' " App. 14a (quoting *United States* v. *2.4 Acres of Land, More or Less, in Lake County, Ill.*, 138 F.2d 295, 297 (7th Cir. 1943)).

In so holding, the Seventh Circuit not only took this quintessential credibility issue away from the jury but also seriously mischaracterized the evidence before the jury on actual authority. While the Seventh Circuit noted that Pressly "was authorized to go to New York to negotiate a deal," he was "authorized" to make an offer and in response to STI's offer he said "we'll take it," the appellate court

nevertheless found that "there was no evidence presented at trial showing that Mr. Pressly had actual authority to bind U.S. Trust in a contract." App. 13a. The Seventh Circuit also ignored STI's evidence that Pressly had told STI not to worry that no one from U.S. Trust was at the meeting and that, at the end of the meeting, he had said "yes, we have a deal." The Seventh Circuit did not address the inconsistencies in the testimony of these witnesses, the contrary evidence proffered by STI, or the fact that U.S. Trust's CEO and senior vice-president were interested witnesses testifying about private conversations to which they alone were parties.

The Seventh Circuit also upheld the District Court's decision not to instruct the jury on apparent authority. App. 15a. The Seventh Circuit described New York law as rejecting "the idea that an agent can confer apparent authority on him or herself," and it found that "STI did not produce any evidence demonstrating that STI had any direct interaction with U.S. Trust principals before or during the negotiations for the sale of the shares." App. 15a. Even though Pressly had made statements which indicated that he had authority, the circuit court concluded that those statements were insufficient. App. 16a. The court did not explain why it disregarded the testimony of U.S. Trust's officers that Pressly was authorized to make statements to STI about his authority. The Seventh Circuit also stated that, under New York law, "[o]ne who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority." App. 9a (quoting *Ford* v. *Unity Hosp.*, 299 N.E.2d 659, 664 (N.Y. 1973)).

STI's petition for rehearing was denied. App. 40a.[3]

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[3] While the appeal was pending, STI filed an action in the Northern District of Georgia against the parties to whom the Stock was sold to recover the Stock. *Sarkes Tarzian, Inc.* v. *Bull Run Corp.*, Case No. 1:30-CV-0610 (JTC) (N.D. Ga.). In the course of discovery in that case, Pressly produced notes of his discussions

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S RULING THAT A JURY MAY NOT DISBELIEVE "UNREBUTTED" TESTIMONY OF INTERESTED WITNESSES DEEPENS AN EXISTING CIRCUIT CONFLICT AND IMPROPERLY TAKES CREDIBILITY ISSUES AWAY FROM THE JURY

The "principal purpose" for the exercise of this Court's certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991); S. Ct. Rule 10(a). The circuits are in conflict over whether a jury may disbelieve the unrebutted testimony of interested witnesses. This conflict raises issues that are critical to the consistent application of Rule 50 and to litigants' right to a jury trial. The Seventh Circuit's ruling in this case that a jury is required to believe the allegedly uncontradicted testimony of interested witnesses deepens this conflict and now provides a clear record on which this Court can resolve the conflict.

A. This Court Has Long Distinguished Between The Testimony of Interested Witnesses and Disinterested Witnesses.

In *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000), this Court addressed the deference that a court must give to a jury when deciding a motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. The Court required judges to "draw all reasonable inferences in favor of the nonmoving party[; judges] may not make credibility determinations or weigh the evidence." *Id.* at 150. The Court stated that a trial

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with Bull Run. U.S. Trust improperly withheld those notes in the instant case on privilege grounds. On April 18, 2005, STI filed a motion in the Southern District of Indiana for a new trial in this case based on this newly discovered evidence. That motion is pending before the court.

court should review the record as a whole, but in doing so "it must disregard *all evidence favorable to the moving party that the jury is not required to believe*." *Id.* at 151 (emphasis added). The sole example given of the type of evidence the jury is required to believe was the "uncontradicted and unimpeached testimony of *disinterested* witnesses." *Id.* (emphasis added) (citing 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2529, at 300 (2d ed. 1995) [hereinafter WRIGHT & MILLER]). The Court in *Reeves* did not discuss how trial courts should treat the testimony of *interested* witnesses, and a clear circuit conflict has deepened on this important question.

Before *Reeves*, this Court had addressed the role of the jury in determining the credibility of interested witnesses, and although the context varied, the principles remained constant. For well over one hundred years, this Court recognized that it is the province of the jury to assess the credibility of testimony by interested witnesses. For example, in *Quock Ting* v. *United States*, the Court rejected the testimony of a habeas petitioner and his father that the petitioner was born in the United States. 140 U.S. 417, 420 (1891). The Court held that a finder of fact is not required to believe improbable testimony by interested witnesses, even if uncontradicted. *Id.* at 421. Quoting from New York precedent, this Court noted the distinction between interested and disinterested testimony: "It is undoubtedly a general rule that when a disinterested witness, who is in no way discredited, testifies to a fact within his own knowledge * * * the fact is to be taken as legally established * * *. But [h]ere the witness was not wholly disinterested." *Id.* (quoting *Kavanagh* v. *Wilson*, 70 N.Y. 177, 179 (1877)).

Shortly thereafter, in *Sonnentheil* v. *Christian Moerlein Brewing Co.*, this Court affirmed a lower court's denial of j.n.o.v. despite the defendants' uncontradicted testimony that they had no knowledge of the alleged fraud. The Court explained that

> while the jury had no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses, the very courts that lay down this rule qualify it by saying *the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.*

172 U.S. 401, 408 (1899) (citations omitted) (emphasis added).

In *Chesapeake & Ohio Railway Co.* v. *Martin*, 283 U.S. 209, 216 (1931), the Court reaffirmed the general proposition that "the question of the credibility of witnesses is one for the jury alone," but reversed a jury verdict because the interested witness was not cross-examined; the accuracy of his testimony was not controverted, either directly or circumstantially; and the evidence to controvert his testimony was not solely in the hands of the interested party.

In *Sartor* v. *Arkansas Natural Gas Corp.*, reversing an order granting summary judgment, this Court held that a jury is not bound by the expert opinion testimony of a defendant's officers or directors or others with an interest in the subject matter of the litigation. 321 U.S. 620, 626-28 (1944). "The rule has been stated that if the court admits the testimony, then it is for the jury to decide whether any * * * weight is to be given to the testimony * * *. [T]he jury, even if such testimony be uncontradicted, may exercise their independent judgment." *Id.* at 627-28 (citations omitted).

As explained by one leading commentator: "No one would champion a rule which requires belief of anything an interested witness might say." Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 941 (1971).

B. The Circuits Are Split On When A Jury Is Permitted To Disbelieve The Unrebutted Testimony Of An Interested Witness.

Despite this Court's guidance in *Reeves* and the consistent recognition by this Court that interested witness testimony inherently raises credibility issues that must be determined by a jury, the circuits are split on the treatment of interested witness testimony. *See also* 9A WRIGHT & MILLER § 2527, at 286 ("The matter is less clearcut if the witness has some interest in the case."); William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1706 (2001) ("Treatment of the testimony of parties, interested witnesses, and experts has been less uniform."). This conflict creates divergent results on a matter of fundamental concern to the administration of the federal trial courts.

The Second, Third, Fifth, Eighth, Eleventh, and Federal Circuits have held that judges ruling on dispositive motions cannot rely on the uncontradicted testimony of interested witnesses because a jury is not required to believe such testimony. *See, e.g.*, *Book* v. *Dettenrieder*, 14 Fed. Appx. 40, 43 (2d Cir. 2001) (unreported) (affirming denial of judgment as a matter of law on damages even though plaintiff's testimony on pain and suffering was uncontradicted); *Willis* v. *State Farm Fire & Cas. Co.*, 219 F.3d 715, 720 (8th Cir. 2000) (vacating judgment as a matter of law despite plaintiff's uncontradicted testimony concerning location of lost money); *Hiltgen* v. *Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995) (affirming denial of j.n.o.v. despite driver's uncontradicted testimony concerning whether his lights were turned on at time of accident); *Amsted Indus. Inc.* v. *Buckeye Steel Castings Co.*, 24 F.3d 178, 183 (Fed. Cir. 1994) (affirming denial of judgment as a matter of law on willful infringement despite engineering director's uncontradicted testimony that he copied upon good faith belief that patent invalid); *Bhaya* v. *Westinghouse Elec. Corp.*, 832 F.2d 258,

261-62 (3d Cir. 1987) (reinstating jury verdict after lower court granted j.n.o.v. based on uncontradicted testimony of plaintiff's supervisor); *Gregg* v. *U.S. Indus., Inc.*, 887 F.2d 1462, 1470 (11th Cir. 1989) (dictum) ("Even uncontradicted expert opinion testimony is not conclusive, and the jury has every right not to accept it.").

In this case, the Seventh Circuit joined the Fourth Circuit in holding that juries must accept the allegedly unrebutted testimony of interested witnesses, meaning that courts must accept that testimony in deciding which cases *go* to a jury. *Anderson* v. *Russell*, 247 F.3d 125, 130 (4th Cir. 2001) (affirming judgment as a matter of law based on testimony concerning police officer's state of mind prior to use of force); *Corrugated Paper Prods., Inc.* v. *Longview Fibre Co.*, 868 F.2d 908, 913-15 (7th Cir. 1989) (affirming summary judgment based on testimony concerning defendant's state of mind for contract claim). The Seventh Circuit's categorical rule does not distinguish between (1) situations in which a witness's testimony is contradicted by direct evidence; (2) situations in which a witness's testimony is contradicted by circumstantial evidence; and (3) situations in which there is some other reason for the jury to disbelieve a witness's testimony. *See, e.g., Reeves,* 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of [a material fact], and it may be quite persuasive."). Moreover, the Seventh Circuit's rule applies even when the information put forth by an interested witness comes only from that person's experience, and, absent a confession on the stand, the opponent has no means of directly rebutting the statements of such a witness.

The First, Ninth, Tenth, and D.C. Circuits have addressed those situations. While these Circuits have not set forth a bright line rule, each has recognized that juries may disregard the testimony of interested witnesses under a variety of circumstances—such as when reasons exist to doubt the

credibility of the witness, when circumstantial evidence rebuts the witness's testimony and when the evidence is exclusively within the control of the other party.

For example, the First and D.C. Circuits have held that courts and juries may disregard uncontradicted testimony of an interested witness when there is a reason to doubt the witness's credibility. *Gillespie* v. *Sears, Roebuck & Co.*, 386 F.3d 21, 33 (1st Cir. 2004) (jury may consider plaintiff's "strong financial interest" in denying knowledge of product's defect and danger to disregard uncontradicted testimony); *Quintana-Ruiz* v. *Hyundai Motor Corp.*, 303 F.3d 62, 75-76 (1st Cir. 2002) (jury may disregard uncontradicted testimony if it is "delivered in a manner giving rise to doubts"); *Nat'l Org. for Women* v. *Operation Rescue*, 37 F.3d 646, 662 (D.C. Cir. 1994) ("The trier of fact need not accept even uncontroverted evidence if it doubts the credibility of that evidence.").

The Ninth and Tenth Circuits similarly have held that courts and juries may disregard directly uncontradicted testimony of interested witnesses when an evidentiary basis exists to do so. *Frank Music Corp.* v. *Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 513-14 & nn.7-8 (9th Cir. 1985) (court may disregard uncontradicted testimony of interested "so long as it does so with good reason"); *Chicago, Rock Island & Pac. Ry. Co.* v. *Howell*, 401 F.2d 752, 754 (10th Cir. 1968) (jury may disbelieve testimony where there are inconsistencies).

Furthermore, the D.C., Ninth and Tenth Circuits agree that a jury may disbelieve the directly uncontradicted testimony of interested witnesses when the potentially dispositive facts are in the exclusive control of one party. *Mazaleski* v. *Treusdell*, 562 F.2d 701, 717 (D.C. Cir. 1977) (courts may disregard uncontradicted testimony "when essential facts are solely within the control of the moving party"); *Oborn* v. *Gates*, No. 90-55003, 1991 WL 111882, at *2-3 (9th Cir. June 25, 1991) (unpublished) (reversing directed verdict

premised on defendants' testimony which plaintiff could not "easily contradict"); *Chicago, Rock Island*, 401 F.2d at 754 (jury must accept as true testimony of witnesses that is "capable of contradiction"); *cf. Mammoth Oil Co.* v. *United States*, 275 U.S. 13, 51 (1927) ("[A]ll evidence is to be weighed according to the proof which was in the power of one side to have produced, and in the power of the other to have contradicted."). As a corollary to the requirement that the fact be "capable of contradiction," the Tenth Circuit has held that "it is particularly wrong to base a summary judgment on the deposition of an interested party on facts * * * known only to him." *Nat'l Aviation Underwriters, Inc.* v. *Altus Flying Serv., Inc.*, 555 F.2d 778, 784 (10th Cir. 1977) (footnote omitted).

In this case, the critical testimony concerned private conversations between Pressly and his client. There was ample reason in the record to doubt the witnesses' credibility because testimony established that during the negotiations attorney-agent Pressly had stated "yes, we have a deal" and then the U.S. Trust officers testified that there was no deal. There were multiple inconsistencies in the testimony, including inconsistencies between Pressly's testimony and the testimony of the interested witnesses and internal inconsistencies in the testimony of those witnesses. *See supra* at 7-8. The only evidence that limitations had been placed on Pressly's authority came from the interested witnesses describing what they had said to each other. The jury therefore had the key role of assessing conflicting stories. Had the case been tried in circuits other than the Fourth or the Seventh, the jury's findings would have been dispositive.

C. The Split In The Circuits Is On An Important And Recurring Federal Question.

This circuit conflict creates a split among the federal courts on a recurring federal issue that will produce different results in identical cases. As Justice White explained in *Schwimmer*

v. *Sony Corp.*: "Because the scope of review will often be influential, if not dispositive, of a motion for judgment [as a matter of law], this disagreement among the federal courts of appeals is of far more than academic interest." 459 U.S. 1007, 1009 (1982) (dissenting from denial of certiorari).

Here, the Seventh Circuit found as a matter of law that the jury had to believe the testimony of U.S. Trust's senior management. By contrast, in *Uffelman* v. *Lone Star Steel Co.*, the Fifth Circuit held that the jury did not have to believe the testimony of the defendant's human resources manager, noting that "the jury is entitled to weigh the credibility of witnesses and to disbelieve self-serving testimony." 863 F.2d 404, 409 (5th Cir. 1989). Similarly, in *Oborn* v. *Gates*, to negate the plaintiff's claim that an informant was acting under color of state law in a Section 1983 action, the defendants—police officers and the informant—testified, uncontradicted at trial, that the officers instructed the informant not to take the plaintiff's property. 1991 WL 111882, at *2-3 (9th Cir. June 25, 1991). The Ninth Circuit reversed an order granting judgment as a matter of law for the defendants because "this was not testimony that [plaintiff] could easily contradict, since only the police and [informant] knew whether the instruction had been given[, and] [t]hey were all defendants, who knew that they would prevail if [plaintiff] failed to show that [informant] was a government agent." *Id.* at *3.

Two cases in the Fourth and Fifth Circuits that are virtually identical to each other illustrate the importance of the conflict for the administration of justice. In *Bazan* v. *Hidalgo County*, a police officer's uncontradicted deposition testimony described the police officer's observations and state of mind leading up to the use of deadly force. 246 F.3d 481, 485-86, 491-92 (5th Cir. 2001). The Fifth Circuit refused to find qualified immunity as a matter of law because "the evidence the Trooper claims is uncontradicted and unimpeached comes for the most part, if not exclusively,

from an interested witness—[the] Trooper." *Id.* at 492. In *Anderson* v. *Russell*, by contrast, a police officer's uncontradicted trial testimony described the police officer's observations and state of mind leading up to the use of deadly force. 247 F.3d 125, 128, 130 (4th Cir. 2001). The Fourth Circuit affirmed the trial court's entry of judgment as a matter of law on qualified immunity because "[g]iven the uncontroverted evidence as to what [the police officer] perceived immediately before firing, we do not believe that there is a legally sufficient evidentiary basis for a rational jury to find for [plaintiff] on the issue of excessive force." *Id.* at 130.

Consistent application of federal rules of procedure in different circuits is important to the federal system, and consistency is especially important when it comes to such a fundamental matter as the province of the jury in a federal trial. Because the circuits have developed different and conflicting tests about when to take cases away from juries, this Court's guidance is needed.

D. The Seventh And Fourth Circuits' Position Undermines An Important Constitutional Right.

When the Seventh Amendment was adopted in 1791, the common law in the United States and England had blanket prohibitions *against* party and interested witness testimony in civil actions. *E.g.*, Sidney Bobbé, *The Uncontradicted Testimony of an Interested Witness*, 20 CORNELL L.Q. 33, 36-37 (1934). It was not until the mid-nineteenth century that legislation lifted the common law prohibition. *Id.* In enacting such legislation, legislatures often expressly noted that even though interest should not affect testimony's admissibility, juries should weigh interest in judging the credibility of the witness. *Id.* at 37; *cf. United States* v. *Abel*, 469 U.S. 45, 52 (1984) ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a

witness' testimony.").

The Fourth and Seventh Circuits' holdings ignore the concerns of both the common law and the nineteenth century legislatures and create a situation inconceivable when the Seventh Amendment was adopted. The post-1791 elimination of the common law prohibition on interested witness testimony *expanded* access to the jury as parties and interested witnesses testified to otherwise crucial facts that no disinterested witness could provide. The Fourth and Seventh Circuits, however, use this previously barred testimony to *limit* access to the jury.

This Court has consistently recognized the importance of demeanor in determining the outcome of cases. "There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony." *Aetna Life Ins. Co.* v. *Ward*, 140 U.S. 76, 88 (1891). As the Court noted in *Quock Ting*, a witness's "manner * * * of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts." 140 U.S. at 421. Further, as Justice Stevens explained in *Gasperini*, deference is often needed "to the lower court's resolution of legal, yet fact-intensive, questions." 518 U.S. at 448 (dissenting).

Furthermore, as courts and legislatures have consistently recognized, if courts require juries to accept the testimony of interested witnesses, the witnesses may have incentives to lie, especially where an opposing party has no direct way to contradict the testimony. *Int'l Shortstop, Inc.* v. *Rally's, Inc.*, 939 F.2d 1257, 1265-66 (5th Cir. 1991); *Mazaleski* v. *Treusdell*, 562 F.2d 701, 717 (D.C. Cir. 1977). As Professor Cooper has explained: "However high current levels of perjury may be, the peak which would be reached if parties to a suit knew that they could automatically win by direct testimony to crucial facts—and could defeat an opponent's

possibly perjured testimony only by providing contrary direct testimony—would be breathtaking." Cooper, *supra*, at 941. An interested witness testifying about facts exclusively within a party's control "is especially likely to misrepresent the facts, since he or she testifies with the knowledge that no witness could be found to contradict whatever is said." Eric Schnapper, *Judges Against Juries--Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 276-77 (1989).

For these reasons, courts must apply Rule 50 in a manner that is consistent with the Seventh Amendment. *E.g.*, *Tights, Inc.* v. *Acme-McCrary Corp.*, 541 F.2d 1047, 1055 (4th Cir. 1976); Dorsaneo, *supra*, at 1698. The Seventh Amendment guarantees all litigants that a jury will decide disputed issues of fact. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1072 (2003). The language of the Seventh Amendment captures the concept concisely: "[N]o fact tried by a jury[] shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." As Justice Scalia has explained, "[T]he practice of federal appellate reexamination of facts found by a jury is precisely what the People of the several States considered not to be good legal policy in 1791." *Gasperini*, 518 U.S. at 450 (dissenting) (emphases omitted).

E. The Seventh And Fourth Circuits' Rule Reflects A Problematic Trend That Is Likely To Continue Unless The Court Takes Action.

The Seventh and Fourth Circuits' rule is emblematic of the continuing trend of courts of appeals to expand the role of judges and reduce the role of juries in deciding cases.[4] There

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[4] In the 50 years since Professor Wright discussed appellate courts' "desire to 'do justice' " when reviewing jury verdicts and the costs of such review, commentators have expressed concerns

is no question that trials are "vanishing" as courts take a more active role in disposing of cases. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004) (analyzing 30 years of data to conclude that the reduction in trials correlates to increased nontrial adjudication, not settlements). In the late 1990s, of 100 civil cases filed, a trial started in fewer than six. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000). In 2004, of 100 civil cases filed, fewer than two ended up going to trial. In documenting the historic decline of federal civil trials since 1962, Professor Marc Galanter has noted the "startling * * * 60 percent decline in the absolute number of trials since the mid 1980s." Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

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about this trend. Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 779-82 (1957) ("[T]he best way to do justice in the long run is to confine to a minimum appellate tampering with the work of the trial courts."); Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 127, 155 (2001) (identifying, after empirical analysis of a database covering 10 years of federal appeals, a pro-defendant bias in appellate review of jury verdicts "owing to the appellate judges' sizeable misperceptions regarding the jury"); Schnapper, *supra*, at 246-53, 354-55 (describing, after analyzing a year of published federal appellate decisions, several biases of appellate review of jury verdicts and concluding that "a large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result is precisely the verdict that would have returned had they been in the jury box"); *see also* Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 899 (2002) ("[Appellate courts] seem to be saying that the hearing of witnesses and proof is less valuable than the scanning of printed records and that panels of judges are better decision makers than common law courts and juries.").

In this case, the jury—after hearing evidence for more than a week and observing the demeanor of the witnesses for both sides—rejected the testimony of U.S. Trust's officers that Pressly lacked authority. Applying common sense—and making a first-hand judgment as to the credibility of their peers—the jury concluded that a party who would say "yes, we have a deal," and then come into court and deny it, could not be believed. The trial judge, who presided over the trial and heard the evidence, then rejected efforts by the losing litigant to undo the jury's verdict. For a court of appeals to reverse the jury on the facts, based on its review of the written record, where it has no more expertise then the jury, and indeed has less because it could not assess the credibility of witnesses, is to arrogate to the judiciary a role it was never meant to play. *See Gasperini*, 518 U.S. at 456-59 (Scalia, J., dissenting).[5]

II. THE SEVENTH CIRCUIT VIOLATED IMPORTANT FEDERALISM PRINCIPLES BY CREATING ITS OWN LAW ON APPARENT AUTHORITY

This petition also presents the recurring situation in which a federal court, violating the strictures of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), and its progeny, has impermissibly created its own common law. When such overreaching creates "two conflicting systems of law controlling the primary activities of citizens," it undermines the important federalism principles of our judicial system and "must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs." *Hanna* v. *Plummer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). That is especially true where, as here, the issue involves the extent to which a

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[5] This Court has insisted in a series of recent cases that the jury's role must be respected in criminal cases. *See United States* v. *Booker*, 125 S. Ct. 738 (2005); *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). This is the case in which to be clear that civil juries, like criminal juries, are vital to our system.

third party can rely on the representations of an agent operating in New York, one of the most important commercial centers in the world. The Seventh Circuit's fundamental departure from *Erie*'s teachings provides an independent basis for review.

1. In *Erie,* this Court ruled that a federal court sitting in diversity must use state substantive law as its rule of decision unless the issue to be decided is governed by the United States Constitution or federal law. 304 U.S. at 78. Prior to *Erie*, the outcome of a case could vary greatly depending on whether the case was brought in federal or state court. *Id.* at 75-76. The *Erie* rule was intended to foster uniformity and predictability, thereby eliminating forum shopping and inequitable administration of the laws. *Id.*; *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001).

2. In this action, while purporting to apply New York law, the Seventh Circuit ignored controlling authority in New York and created new law to affirm the trial court's decision not to instruct the jury on apparent authority. Under New York law, a principal may communicate an agent's authority through its words or its conduct, through its course of business, or circumstantially. *Chem. Bank* v. *Affiliated FM Ins. Co.*, 169 F.3d 121, 130 (2d Cir.), *reh'g granted in part on other grounds*, 196 F.3d 373 (2d Cir. 1999); *L. Smirlock Realty Corp.* v. *Title Guarantee Co.*, 421 N.Y.S.2d 232, 238 (N.Y. App. Div. 1979), *aff'd*, 418 N.E.2d 650 (N.Y. 1981). Further, and notwithstanding the Seventh Circuit's statements to the contrary, New York law is clear that a principal need not have direct contact with a third party to bestow apparent authority on its agent. *See, e.g., Gen. Motors Acceptance Corp.* v. *Finnegan*, 592 N.Y.S.2d 570, 572 (N.Y. Sup. Ct. 1992) (direct contact not necessary, especially where "the principal has voluntarily placed the agent in such a situation that a person of ordinary prudence conversant with business usages * * * is justified in assuming that such agent has authority to perform a particular act"

(citation omitted)); *accord Green Door Realty Corp.* v. *TIG Ins. Co.*, 329 F.3d 282, 289-92 (2d Cir. 2003) (apparent authority can be based on conduct of insurer in permitting agent to accept premiums); *Chem. Bank*, 169 F.3d at 130 ("Were the law otherwise, the benefits of the doctrine of apparent authority would be severely diminished because a lack of contact between the principal and third party often leaves the third party with little choice but to deal with the purported agent."). Thus, to the extent that the Seventh Circuit ruled that direct contact between the principal and the third party is a necessary prerequisite to apparent authority in New York, it was wrong.

New York law is also clear that apparent authority can be based on the authorized statements of the agent. *See, e.g.*, *Hallock* v. *State of New York*, 474 N.E.2d 1178, 1182 (N.Y. 1984) (sending attorney to settlement conference constituted an "implied representation" by client that attorney had authority to bind him); *NLRB* v. *G&T Terminal Packing Co.*, 246 F.3d 103, 114-15 (2d Cir.), *reh'g granted on other grounds*, 19 Fed. Appx. 16 (2d Cir. 2001) (attorney's authorized statement that "she was there to enter into an agreement" supported a finding of apparent authority); RESTATEMENT (SECOND) OF AGENCY §§ 27 cmt. a, 284 cmt. d (apparent authority may arise from "authorized statements of the agent").[6] That is because, in analyzing the scope of the agency from the standpoint of apparent authority, the issue is not the principal's intent; the issue is whether the third party's reliance on the authorized statements of the agent was reasonable. *See Hoysradt* v. *Nilles-Ford-Mercury, Inc.*, 563 N.Y.S.2d 956, 959 (N.Y. App. Div. 1990) ("[A]pparent authority may exist even if the principal did not actually

[6] New York courts look to the Restatement of Agency when construing apparent authority. *See, e.g., Beckman* v. *Greentree Sec., Inc.*, 663 N.E.2d 886, 889 (N.Y. 1996); *Hallock*, 474 N.E.2d at 1181. The Seventh Circuit noted this provision in its discussion of apparent authority but did not apply it to Pressly's statements to STI.

subjectively intend to create an agency relationship."). Here, Pressly's statements that he was there "to decisively do a deal today," he was "authorized" to make an offer and "we'll take it"—all of which were authorized by U.S. Trust—led STI to believe that he meant exactly what he said. To the extent that the Seventh Circuit held that this testimony was insufficient as a matter of New York law to create apparent authority, it was also wrong.

Finally, under New York law, if an agent is appointed to do business, that agent becomes the general agent for the transaction of that business. The agent binds the principal by its acts even if those acts exceed private limitations given by the principal that are undisclosed to the third party. *See Globe & Rutgers Fire Ins. Co.* v. *Warner Sugar Refining Co.*, 176 N.Y.S. 3, 5 (N.Y. App. Div. 1919) ("No man is at liberty to send a man forth to deal for him, with secret instructions as to the manner in which he is to execute his agency, which are not communicated to those with whom he deals and then when his agent has deviated from those instructions to say that he was a special agent, that the instruction [sic] were a limitation upon his authority, and those that dealt with him acted at their peril."); *accord Columbia Broad. Sys, Inc.* v. *Stokely-Van Camp, Inc.*, 522 F.2d 369, 377 n.16 (2d Cir. 1975) (if advertising agencies generally executed contracts binding their clients, and third party reasonably believed the agency had this authority, principal would be bound even if it had placed limitations on the agent's authority); *Am-Haul Carting, Inc.* v. *Contractors Cas. & Sur. Co.*, 33 F. Supp. 2d 235, 244 (S.D.N.Y. 1998) (undisclosed limitations on agency are not binding on unwitting third parties).

U.S. Trust admitted that Pressly was its agent, and he was sent to New York "to negotiate a deal." AA 522. The Seventh Circuit found, however, that there were limitations on his authority, and it ruled that STI bore the risk of any failure by Pressly to disclose those limitations. For that proposition, the Seventh Circuit relied on *Ford* v. *Unity*

Hospital, 299 N.E.2d 659, 644 (N.Y. 1973). Eleven years after *Ford* was decided, however, the New York Court of Appeals—the highest court in the state—ruled that the client bears the risk of any failure by the agent "to reveal any restrictions" on the agent's authority. *Hallock*, 474 N.E.2d at 1181-82. As Chief Judge Kaye explained: "[The client] must bear [the] responsibility [for the attorney's failure to disclose any limitations on his authority], and are relegated to relief against their former attorney for any damages which his conduct may have caused them." *Id.*

In the wake of *Hallock*, courts have noted that *Ford* does not apply to situations involving apparent authority. *Herbert Constr. Co.* v. *Cont'l Ins. Co.*, 931 F.2d 989, 995 (2d Cir. 1991). Courts have consistently ruled that, in cases where the issue is apparent authority, the principal bears the risk of any failure by the agent to disclose limitations on the scope of his authority. *See, e.g.*, *Johnson* v. *Nationwide Gen. Ins. Co.*, 971 F. Supp. 725, 734-35 (N.D.N.Y. 1997), *aff'd*, 162 F.3d 1148 (2d Cir. 1998) (principal liable to third party for actions of agent; apparent authority based solely on authorized statements and conduct of agent); *King World Prods., Inc.* v. *Fin. News Network, Inc.*, 660 F. Supp. 1381, 1385 (S.D.N.Y.), *aff'd*, 834 F.2d 267 (2d Cir. 1987) (if the third party reasonably believes the agent has apparent authority, the third party "need not inquire further into actual authority, and the principal will be bound by its agent"); *Carl Wagner & Sons* v. *Appendagez, Inc.*, 485 F. Supp. 762, 770 (S.D.N.Y. 1980) (sales agent bound principal company when company did not disclose to third party that the contract needed to be reviewed by the home office). To quote the Second Circuit in *Herbert*: "[A] recovery based on the doctrine of apparent authority does not require that the third party have inquired into the scope of the agent's authority." 931 F.2d at 995.

3. The Seventh Circuit disregarded this clear precedent and instead created its own law—ruling that STI bore the risk

of any undisclosed limitations on Pressly's authority. App. 14a. Such a nullification of state law amounts to usurpation of the function of state courts, violates the *Erie* doctrine, and is an impermissible exercise of federal judicial power. *See, e.g.*, *Leavitt* v. *Jane L.*, 518 U.S. 137, 145 (1996) ("[I]t is an odd notion of judicial restraint that would compel [this Court] to cast a blind eye on overreaching by lower federal courts."); *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 514 (1989) (this Court is reluctant to defer to federal court construction of state law when the lower court "has fallen into plain error"); *Frisby* v. *Schultz*, 487 U.S. 474, 483 (1988). The Seventh Circuit does not have the power to create such new elements or exceptions to New York's apparent authority.

4. Litigants expect state law to be applied uniformly whether they are in state or federal court and whether in the Seventh or the Second Circuit. Intrusions such as this by federal courts into state common law disrupt the mechanisms by which such common law has been developed and shaped by state courts. As the Seventh Circuit itself has noted, "missteps by federal courts can have a grave impact on the principled and orderly growth of state law principles," with the potential for "disastrous results." *Allstate Ins. Co.* v. *Menards, Inc.*, 285 F.3d 630, 638 (7th Cir. 2002).

Because the Seventh Circuit's creation of New York law cannot be appealed to the highest court of the state, two versions of New York law now implicitly exist, one stemming from the Seventh Circuit's misreading and the other from the cases in New York. The differing rules create an incentive for forum shopping. Moreover, this variation vindicates the strategic desires of some parties to file in federal court in the hopes that a federal judge will get state law wrong. *See* Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1300 (2003). The Seventh Circuit's view of New York law will "inevitably skew the decisions of persons and businesses

who rely on [it] and inequitably affect the losing federal litigant [here, STI] who cannot appeal the decision to the [highest] state * * * court." Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1681 (1992).

5. The Seventh Circuit's departure from its *Erie* obligation may have serious practical consequences, creating particularly bad and commercially unwise law. The Seventh Circuit has held, in effect, that principals are not liable for the misrepresentations of their agents as to the scope of their authority. Third parties cannot rely on agents, but must deal directly with the principal. At the end of a day-long negotiation with an attorney with whom it has been dealing for more than six months, when the attorney shakes hands and says "yes, we have a deal," the third party must say, "I don't believe you" and insist on verifying the attorney's representation with his client. In New York, where significant commercial transactions are frequently negotiated by attorneys,[7] this is untenable.

New York is one of the most important financial centers in the world, and its courts have developed clear rules in this area of commercial law. Consistent application of those rules is essential to the efficient workings of the financial industry. Persons doing business in New York are entitled to assume that New York law will be applied faithfully by courts sitting in other jurisdictions, particularly federal courts. *See Finanz Ag Zurich* v. *Banco Economico S.A.*, 192 F.3d 240, 243 (2d Cir. 1999) (there is an expectation of regularity in financial dealings in New York).

The law of agency, in particular, is critical to the negotiation and consummation of commercial transactions. In New York, third parties believe they can rely on the

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[7] *See, e.g., Colli* v. *Wirth*, No. 94 Civ. 3234 (LBS), 1996 WL 243237, at *9 (S.D.N.Y. May 10, 1996) (attorney had apparent authority to negotiate contract).

authorized statements of agents, and they do not typically check back with the principal to determine whether the agent has left something out. By providing that the principal bears the risk of any failure by the agent to disclose limitations on the agent's authority, New York law protects innocent parties in the position of STI and encourages them to do business in that State. But even if the law were not commercially sound, it is the law of New York, and a federal court sitting in diversity cannot, consistent with this Court's precedent, make its own rule of decision.

CONCLUSION

For the foregoing reasons, the petition should be granted, and the judgment of the Seventh Circuit should be reversed.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 03-2994 & 03-3098

SARKES TARZIAN, INC.,

Plaintiff-Appellee-
Cross-Appellant,

v.

U.S. Trust COMPANY OF FLORIDA
SAVINGS BANK

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Indiana, Indianapolis Division
No. 99 C 165—Richard L. Young, *Judge*.

ARGUED APRIL 8, 2004—DECIDED FEBRUARY 14, 2005

Before: KANNE, EVANS, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*.

Sarkes Tarzian, Incorporated ("STI") brought this suit for breach of an oral contract for the sale of non-publicly traded shares of STI stock against U.S. Trust Company of Florida Savings Bank ("U.S. Trust"). A jury found that U.S. Trust breached its contract entered into by James Pressly, who was acting on U.S. Trust's behalf, and awarded STI $4 million in damages. U.S. Trust appeals the district court's denial of its motion for judgment as a matter of law, or in the alternative a new trial, and STI appeals a number of the district court's rulings. For the reasons discussed, we find that STI presented no evidence at trial showing that Mr. Pressly had actual authority to bind U.S. Trust in a contract. We reverse the district court's denial of U.S. Trust's motion for judgment as a matter of law and remand for entry of judgment for U.S. Trust. We also find that the jury instructions that the district court gave to the jury were sufficient to apprise the jury correctly of the applicable law of agency under New York law. As such, the district court did not err by refusing to instruct the jury on apparent authority. Because we find that there was no contract between STI and U.S. Trust, we will not address STI's arguments.

I. Background

STI is a closely-held Indiana corporation. STI, which owns and operates four radio and two television stations, was founded by Sarkes Tarzian and his wife, Mary Tarzian. Mary Tarzian's will stated that upon her death, her shares in STI were to be transferred by her estate (the "Estate") to the Tarzian Family Trust ("the Family Trust"). Mary Tarzian hired James Pressly, a Florida trust and estates lawyer, to revise her will and trust documents, instructing him to modify these documents so that within nine months after her death, the Family Trust's trustees could disclaim, or legally detach themselves from, the 301,119 shares of $4 par value

STI stock that Ms. Tarzian owned. One way for the trustees to disclaim themselves of the stock was to sell it. After the trustees disclaimed this stock, the shares would pass to the Mary Tarzian Charitable Foundation. This action would enable the Estate to avoid paying death taxes. U.S. Trust, the personal representative of the Estate, and Patricia Tarzian (Mary Tarzian's daughter) were appointed trustees of the Family Trust. After Mary Tarzian died on June 7, 1998, U.S. Trust retained Mr. Pressly as counsel for the Estate. Through Mr. Pressly, U.S. Trust retained a broker to find a purchaser for the shares.[1]

U.S. Trust had some difficulty finding a buyer for the shares because Tom Tarzian, a beneficiary of the trust, was unwilling to sell his controlling interest in STI.[2] With the nine-month deadline fast approaching and no willing buyer for the shares identified, Mr. Pressly, on behalf of U.S. Trust, held a meeting with representatives of STI on January 25, 1999 in New York City. The purpose of the meeting was to negotiate a sale of the shares. Present at the meeting were Tom Tarzian and two STI attorneys, Herbert Camp, and Valerie Carney; Mr. Pressly, as the Estate's legal counsel; and periodically by telephone, lawyers who represented Patricia Tarzian, co-trustee of the Family Trust and beneficiary of the Estate and Trust. However, no principal of U.S. Trust attended this meeting.

There is little dispute about what the parties said at the meeting. Mr. Pressly started the meeting by telling the STI representatives not to be concerned about the fact that no one from U.S. Trust was present. Reading from his prepared notes, Mr. Pressly stated, "U.S. Trust is standing by, is fully briefed, and is prepared to sign a definitive purchase and sale

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[1] The shares are not publicly traded and pay no dividends.

[2] Tom Tarzian has voting control of and elects STI's Board of Directors.

contract today if we can negotiate one." STI Attorney Carney's notes also reflect that Mr. Pressly made this statement. Mr. Pressly also stated during the meeting that, "If there is a way to cut the Gordian knot, we're here at your invitation to decisively make a deal today."

U.S. Trust's Chairman and CEO, Townbridge Callaway III, and U.S. Trust Senior Vice President, Ann Cavanaugh, testified that Mr. Pressly had authority to negotiate a sale of the shares but did *not* have authority to enter into a contract on behalf of the Estate. After almost a day of negotiation, Mr. Pressly proposed a sale price of $4 million in cash and $3 million in the form of a promissory note. Mr. Pressly stated, "I am authorized to make this offer."

Following some further negotiations, STI offered to purchase the shares for $4 million cash and a $2 million promissory note. The promissory note had a six-year term at a 7% interest rate. Mr. Pressly conferred with Patricia Tarzian's counsel and then stated, "This is not what we had hoped for and I can't say we're happy with it, but we'll take it." Tom Tarzian asked Mr. Pressly if they had a deal. Mr. Pressly replied, "[y]es, we have a deal." After Mr. Pressly made that statement, the parties shook hands.

Mr. Pressly was then told that STI's general counsel, Valerie Carney, was marking up a sale agreement. Supposedly, Ms. Carney was using as a template the contract for an earlier sale of Patricia Tarzian's STI shares to STI. Ms. Carney faxed the document to Mr. Pressly that night. After leaving the meeting and on his way to the airport, Mr. Pressly received a message from Gray Communications, Inc. offering to pay U.S. Trust $10 million in cash for the shares. On January 28, 1999, U.S. Trust sold the shares to Gray's affiliate, Bull Run, for that price. That same day, Mr. Pressly informed STI of the Bull Run transaction. On

February 2, 1999, STI wrote to U.S. Trust asserting that it had a binding contract and demanded return of the shares.

Ten days later, STI sued Bull Run and the Estate, naming U.S. Trust as the Estate's personal representative.[3] STI claimed that the Estate breached an oral contract to sell its shares to STI for $4 million in cash and a $2 million promissory note. STI had two theories about how the oral contract was made: (1) that the parties had agreed to all material terms and had agreed to negotiate a written document in good faith (referred to under New York law as a "Type I" agreement); or (2) that the parties had agreed to certain important terms and had agreed to negotiate the remaining terms in good faith (referred to under New York law as a "Type II" agreement). STI sought specific performance of the oral contract or damages resulting from the breach.

With motions for summary judgment on both Type I and Type II agreements denied, the case went to trial. The jury found that the Estate had entered into a binding Type I agreement, and awarded STI $4 million in damages. This amount represented the difference between the STI contract price (total of $6 million) and that of Bull Run ($10 million). Per the district court's jury instructions, the jury made no finding on the alleged Type II agreement.

U.S. Trust renewed its motion for judgment as a matter of law and, in the alternative, a new trial. The district judge denied both motions and STI filed a motion to amend the judgment, seeking specific performance and prejudgment interest from the date U.S. Trust allegedly breached the contract. The district court denied the request for specific performance but granted STI prejudgment interest from

[3] Bull Run moved to dismiss for lack of personal jurisdiction. Ultimately, STI filed a notice of dismissal without prejudice as to Bull Run.

August 29, 2002—the date the district court found STI to have been damaged by the breach—through February 3, 2003, the date of the jury's verdict.[4] U.S. Trust appeals the judgment and related rulings. STI cross-appeals the district court's refusal to permit STI to recover benefit-of-the-bargain damages and the district court's order denying specific performance. It also cross-appeals the district court's refusal to award prejudgment damages from the date of the breach.

II. Analysis

While the parties' briefs present us with many issues, we must decide as a threshold matter whether the district court properly denied U.S. Trust's motion for judgment as a matter of law. U.S. Trust's central argument in support of its motion is that no binding contract of any type was created between U.S. Trust and STI. U.S. Trust asserts that Mr. Pressly, the attorney representing the U.S. Trust, did not have the authority necessary to bind U.S. Trust in a stock purchase and sale agreement. As a result, U.S. Trust contends the matter should not have gone to the jury, and the district court's judgment should have been for the Estate as a matter of law. Consequently, U.S. Trust argues that STI can claim no damages for U.S. Trust's sale of the STI shares to Bull Run.

We review *de novo* the district court's denial of a motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. *Harvey* v. *Office of Banks and Real Estate*, 377 F.3d 698, 707 (7th Cir. 2004); *Deimer* v. *Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 343-44 (7th Cir. 1995). We examine all of the evidence in the

[4] August 29, 2002 is the date STI established an employee stock plan.

record to determine whether a reasonable juror could have found in favor of the non-moving party, drawing all reasonable inferences in the non-moving party's favor, and refraining from weighing the evidence or making credibility determinations. *Harvey*, 377 F.3d at 707 (citing *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). We note that "the question is not whether the jury believed the right people, but only whether it was presented with a legally sufficient amount of evidence from which it could reasonably derive its verdict." *Zelinski* v. *Columbia 300, Inc.*, 335 F.3d 633, 638 (7th Cir. 2003) (internal citations omitted).

Oral contracts for the sale of stock are enforceable under New York law, N.Y. U.C.C. § 8-113(a) (providing, in pertinent part, "a contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making.") We therefore direct our attention to the question of whether there was sufficient evidence presented at trial to demonstrate that Mr. Pressly had the authority to bind U.S. Trust in the oral contract with STI[5] The party asserting that an attorney had authority to enter into a contract on behalf of the attorney's client (in this case, STI) bears the burden of proving it. *Nash* v. *Y and T Distribs.*, 616 N.Y.S.2d 402, 403 (N.Y. App. Div. 1994); *Slavin* v. *Polyak*, 470 N.Y.S.2d 38, 39-40 (N.Y. App. Div. 1984). Without the authority for the agent to bind its

[5] The parties do not dispute that we are to apply New York law to their substantive claims. The district court did not decide whether Florida or New York law should apply to the question of Mr. Pressly's authority. However, the district court noted that the law of the two states on this subject is the same. We agree. We therefore apply New York law.

principal in a contract with a third party, or without the principal's subsequent ratification, the contract must be set aside under New York law. *Nash*, 616 N.Y.S.2d at 403.

A party's mere retention of an attorney, and its assignment to that attorney the responsibility to negotiate on behalf of the client does not create authority in the attorney to bind the principal in a contract. *Id.*; *see also Ford* v. *Unity Hosp.*, 299 N.E.2d 659, 664 (N.Y. 1973) ("An agent's power to bind his principal is coextensive with the principal's grant of authority.") With this rule in mind, the question before this court is what kind of authority is sufficient under New York law? Is actual authority sufficient, or does a party need actual and apparent authority?

The highest court of the state of New York, the New York Court of Appeals, has explicitly recognized that "without a grant of authority from the client, an attorney cannot compromise or settle a claim." *Hallock* v. *State*, 474 N.E.2d 1178, 1181 (N.Y. 1984). *See also Nash*, 616 N.Y.S.2d at 403 ("It is settled [New York] law that an attorney must be specifically authorized to settle and compromise a claim."). While this language suggests that only actual authority will do, as U.S. Trust contends,[6] closer study reveals that

[6] U.S. Trust cites Restatement (Third) of Law Governing Lawyers § 22(1) and comment (e) to that section to support its contention that an attorney must have actual authority from the client to bind the client in a significant contract. However, the parties have not pointed us to, nor has our own research yielded any cases demonstrating the New York Court of Appeals's adoption of these particular provisions. In addition, we have found no cases decided by New York's intermediate courts which would indicate that these provisions would most likely be adopted by the New York Court of Appeals. Therefore, we rely on the actual pronouncements of the New York Court of Appeals on the law of its state on this issue. These holdings are in such cases as *Hallock*, and other New York cases which are consistent with *Hallock*.

apparent authority can also suffice. *See Hallock*, 474 N.E.2d at 1181-82 (finding that principal had cloaked attorney in apparent authority and therefore was bound by a settlement agreement into which attorney had entered client in open court). *See also Clark* v. *Bristol-Meyers Squibb and Co.*, 761 N.Y.S.2d 640, 643 (N.Y. App. Div. 2003) ("A settlement is considered binding, however, even where a client is not present at the time it is entered, and where the attorney does not have actual authority, if the court concludes that counsel's actions indicate 'apparent authority' to act on his or her client's behalf.").

A principal confers actual authority on his agent when he objectively manifests to the agent consent to the agency. *Ojeni* v. *Lieber*, 759 N.Y.S.2d 453, 454 (N.Y. App. Div. 2003). As for apparent authority, it is created by "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." *Hallock*, 474 N.E.2d at 1181. New York explicitly rejects the idea that an agent can confer apparent authority on him or herself. *See id.* "Rather, the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal–not the agent." *Id.* (quoting *Ford*, 299 N.E.2d at 664 and Restatement (Second) of Agency § 27 (1958)). Furthermore, we note that a third party may rely on an appearance of authority in such circumstances "only to the extent that such reliance is reasonable." *Id.* Finally, the New York Court of Appeals has held that "[o]ne who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority." *Ford*, 299 N.E.2d at 664. With these principles in mind, we turn to the facts of this case to discern whether there was sufficient evidence presented to support a finding that Mr. Pressly had actual or apparent authority to bind U.S. Trust in a contract with STI.

A. Actual authority

Because there was no writing between U.S. Trust and Mr. Pressly outlining the scope of Mr. Pressly's authority, only testimonial evidence was available to determine whether Mr. Pressly had actual authority. In its appellate brief, STI highlights the testimony of U.S. Trust Chief Executive Officer Callaway as the strongest affirmative evidence from which the jury could infer actual authority. When asked, "was Mr. Pressly authorized to go to New York to negotiate the deal?", Callaway responded, "He was authorized to go to New York to negotiate a deal, yes."

Mr. Pressly told STI at the beginning of the January 25, 1999 meeting, "U.S. Trust is standing by, is fully briefed, and is prepared to sign a definitive purchase and sale contract today if we can negotiate one." At the end of the meeting, Mr. Pressly said, "This is not what we had hoped for and I can't say we're happy with it, but we'll take it." STI also notes that Mr. Pressly stated at one point during the negotiations, "I am authorized to make this offer." In addition, Mr. Pressly admitted on cross-examination that at the New York meeting, he did not state that he was not authorized to bind U.S. Trust.

U.S. Trust directs our attention to the following evidence in the record as supporting its contention that Mr. Pressly did not have actual authority. First, it is undisputed that no one from STI had any communication with U.S. Trust concerning that scope of Mr. Pressly's authority other than with Mr. Pressly himself. Second, U.S. Trust Senior Vice President Cavanaugh testified that Mr. Pressly was authorized "to negotiate a possible deal," but his authority was limited. Specifically, Mr. Pressly "was not authorized to actually execute a contract." U.S. Trust CEO Callaway testified to the specific instructions he gave Mr. Pressly: he was

> to go out and try to find a buyer for the Sarkes Tarzian stock and he was given the authority to negotiate terms, price, and that sort of thing, with the people that he actually found, if any, and was specifically instructed, and there was no argument at all, that he would come back to us with those terms, and present them to us for review, analysis, and a final decision as to whether they were something that we should move forward with.

Further, Mr. Callaway testified that Mr. Pressly "had a fairly wide authority to go out and basically negotiate on terms, and anything else that needed to be considered, but with the definite caveat that whatever he had negotiated came back to us for final determination." It is also undisputed that Mr. Pressly only communicated with U.S. Trust on one occasion about the negotiations. Mr. Pressly communicated with U.S. Trust after the negotiation session concluded. In particular, Mr. Pressly called U.S. Trust CEO Callaway, who was standing by all day long, and stated that there would not be an agreement signed that day. Furthermore, Mr. Pressly told Mr. Callaway that he was released from standing by.

In addition, U.S. Trust argues that the signature blocks on the unsigned written agreements STI prepared after the negotiation meeting were for U.S. Trust's signature, not that of Mr. Pressly. This assertion is consistent with the other record evidence indicating that only U.S. Trust signed agreements on behalf of the Mary Tarzian estate.

U.S. Trust wanted Mr. Pressly to testify concerning the scope of his authority to corroborate Mr. Callaway's testimony. However, the district court prohibited Mr. Pressly from testifying on this issue and U.S. Trust challenges this evidentiary decision on appeal. We review a district court's decision to exclude evidence for abuse of discretion. *Mason* v. *S. Ill. Univ. at Carbondale*, 233 F.3d

1036, 1042 (7th Cir. 2000); *Old Republic Ins. Co.* v. *Employers Reinsurance Corp.*, 144 F.3d 1077, 1082 (7th Cir. 1998).

Apparently concerned about gamesmanship, the district court did not permit Mr. Pressly to testify as to whether he had actual authority to bind his principal in a contract with STI. The district court made this ruling because Mr. Pressly refused to answer STI's question on this point in his deposition. Mr. Pressly claimed attorney-client privilege. The day after Mr. Pressly's deposition, U.S. Trust implicitly waived its attorney-client privilege when Ms. Cavanaugh responded fully to the same questions STI asked Mr. Pressly the day before. The court regarded Mr. Pressly's desire to change his position taken at his deposition as "not playing right."

Even if the district court did abuse its discretion by excluding the testimony, we are not convinced that this alleged error warranted a new trial. *See Old Republic*, 144 F.3d at 1082 (interpreting Federal Rule of Civil Procedure 61 as permitting a new trial only "when a significant chance exists that [evidentiary errors] affected the outcome of the trial."). Mr. Pressly's putative testimony was already in evidence through the testimony of Mr. Callaway and Ms. Cavanaugh. U.S. Trust has not demonstrated how the admission of Mr. Pressly's cumulative testimony would have changed the outcome of the trial. *See Mason*, 233 F.3d at 1047-48 ("It is unlikely that excluding such cumulative evidence would have caused the jury to find differently," citing *Palmquist* v. *Selvik*, 111 F.3d 1332, 1341 (7th Cir. 1997)).[7]

[7] As for STI's statement during its closing argument that there was no corroboration for Mr. Callaway's testimony, U.S. Trust quotes a footnote in *United States* v. *Swanquist*, 161 F.3d 1064, 1074 n.2 (7th Cir. 1998) to argue that it was improper. However,

In any case, whether it was reversible error for the district court to deny Mr. Pressly's testimony on the scope of his authority does not matter here. This is because our review of the record demonstrates that there was no evidence presented at trial showing that Mr. Pressly had actual authority to bind U.S. Trust in a contract. Mr. Callaway and Ms. Cavanaugh's testimony—that they allowed Mr. Pressly to negotiate a deal but not to enter into it without first consulting with U.S. Trust and getting its approval—stood unrebutted. In other words, STI did not discharge its burden of showing that Mr. Pressly had actual authority. *See Gucciardo* v. *Norman*, 527 N.Y.S.2d 62, 64 (N.Y. App. Div. 1988); *Slavin*, 470 N.Y.S.2d at 39-40 ("A party who relies on the authority of an attorney to compromise an action in his client's absence deals with such an attorney at his own peril, and if the settlement is thereafter challenged, he has the burden of establishing that the attorney's actions were, in fact, authorized."). Nor did STI discharge its duty under New York law to ascertain the scope of Mr. Pressly's authority. *See Ford*, 299 N.E.2d at 664 ("One who deals with an agent * * * must make the necessary effort to discover the actual scope of authority."). As U.S. Trust argues, Mr. Pressly told the STI representatives at the negotiation meeting that U.S. Trust was "standing by" all day "to sign" an agreement, if the parties could reach one. STI did not reach out to or call U.S. Trust's principals. Doing nothing cannot be construed as making "the necessary effort to discover the actual scope of [the agent's] authority." *Id.*

STI cites *Carter* v. *Chicago Police Officers*, 165 F.3d 1071 (7th Cir. 1998) for support. In that case, we maintained that "Given the inconsistencies among the evidence and

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in *Swanquist* we ultimately held it was not reversible error for the trial court to allow admittedly improper statements about the significance of absent rebuttal testimony. Therefore, *Swanquist* does not help U.S. Trust on this matter.

testimony presented to the jury, it was certainly within the province of the jury 'to parse the facts, to weigh the credibility of each witness and to disregard the testimony' of witnesses it found to be less credible or not worthy of credence." *Id.* at 1081 (internal citations omitted). In other words, STI suggests that the jury could have disbelieved Mr. Callaway and Ms. Cavanaugh and set aside their testimony. However, *Carter*, as the text quoted above indicates, involved a situation in which the parties had two distinct and inconsistent stories about the events that triggered the lawsuit. Here, even viewed in the light most favorable to STI, the evidence STI points to is not inconsistent with Mr. Callaway and Ms. Cavanaugh's testimony about the scope of Mr. Pressly's authority, namely that Mr. Pressly was authorized to negotiate a deal but not to sign a contract or otherwise bind U.S. Trust without consulting it first.

On these facts, *Carter* is not helpful to STI. However, *United States* v. *2.4 Acres of Land, More or Less, in Lake County, Ill.*, 138 F.2d 295, 297 (7th Cir. 1943) is instructive. *2.4 Acres* holds that, "neither has the jury the right arbitrarily to ignore or discredit the testimony of unimpeached witnesses so far as they testify to facts." *Id.*

With no showing of actual authority, we turn to the question of whether there was evidence demonstrating Mr. Pressly had apparent authority to bind U.S. Trust under New York law.

B. Apparent authority

The district court refused to instruct the jury on apparent authority, because it concluded that there were insufficient facts to support the claim under New York law. STI appeals this ruling. Our review of a district court's rejection of a proposed jury instruction is limited. We first ascertain

whether the instructions as a whole were sufficient to apprise the jury correctly of the applicable law and, if not, whether the instructions so misguided the jury that a litigant is prejudiced, warranting reversal. *Maltby* v. *Winston*, 36 F.3d 548, 560 (7th Cir. 1994).

We agree with the district court's decision not to submit an apparent authority instruction to the jury. We recall that under New York law, apparent authority is created by "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." *Hallock*, 474 N.E.2d at 1181. As we stated above, New York explicitly rejects the idea that an agent can confer apparent authority on him or herself. *Id.* "Rather, the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal—not the agent." *Id.* (quoting *Ford*, 299 N.E.2d at 664 and Restatement (Second) of Agency § 27 (1958)). *See also Nash*, 616 N.Y.S.2d at 403; *Melstein* v. *Schmid Labs., Inc.*, 497 N.Y.S.2d 482, 483 (N.Y. App. Div. 1986). The district court was correct in concluding that STI did not produce any evidence demonstrating that STI had any direct interaction with U.S. Trust principals before or during the negotiations for the sale of the shares. Nor did STI observe any actions by U.S. Trust that would indicate that U.S. Trust had cloaked Mr. Pressly in apparent authority. We conclude, therefore, the district court committed no error by refusing to instruct the jury on apparent authority.

STI seeks to shore up support for its apparent authority claim by citing the Restatement (Second) of Agency and a number of cases. However, these citations provide no traction for STI. STI points to two sections of the Restatement (Second) of Agency. First, STI contends that

section 8, comment (b) aids its case. That comment provides that "The manifestation of the principal may be made directly to a third person, or may be made to the community, by signs, by advertising, by authorizing the agent to state that he is authorized, or by continuously employing the agent."

In addition, STI cites section 27, comment (a) of the Restatement (Second) of Agency. This provision states that apparent authority may arise "from authorized statements of the agent" that come to the third party if the principal is responsible for the information. Specifically, STI notes Mr. Pressly's statements "I am authorized to make this offer" and "we'll take it" as sufficient to cloak Mr. Pressly with apparent authority. STI also cites *National Labor Relations Board* v. *G & T Terminal Packaging Co., Inc.*, 246 F.3d 103, 115 (2d Cir. 2001) to support its contention that apparent authority arose from Mr. Pressly's statements. However, we find that *G & T Terminal* does not apply in this situation. In *G & T Terminal*, the court found there was substantial evidence to support the Administrative Law Judge's conclusion that the attorney had apparent authority to bind the client. In *G & T Terminal*, the client company's president had attended an earlier negotiating session at which time he agreed to all of the contract terms except an arbitration clause. The attorney stated at the meeting, "she was there to enter into an agreement." *Id.* By contrast, in this case, U.S. Trust's CEO Callaway did not speak to Mr. Pressly the entire day. Nor was he was ever present at the negotiation meeting. In essence, there were no actions or words of CEO Callaway which STI could construe as cloaking Mr. Pressly with authority to bind U.S. Trust. Further, unlike the president in *G & T Terminal*, Mr. Callaway was unaware of any of the terms Mr. Pressly had discussed with STI. Finally, unlike the attorney in *G & T Terminal* who said she (as opposed to her client) was there to "enter into an agreement," Mr. Pressly made no such statement. Rather, Mr. Pressly stated only that he was there

to *negotiate* an agreement which U.S. Trust, the principal, was standing by to sign.

In sum, we find STI's arguments on apparent authority unconvincing. The district court did not err by refusing to instruct the jury on this issue.

III. Conclusion

We find that Mr. Pressly lacked authority to enter U.S. Trust in a binding stock sale and purchase agreement with STI as a matter of New York law and consequently conclude that no contract was ever created. The case should not have gone to the jury. As the existence of the contract is a threshold matter in this case, we need not analyze the parties' remaining arguments. The case is REVERSED and REMANDED with instructions to enter judgment for U.S. Trust.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 99-165-C-Y/S

SARKES TARZIAN, INC.,

Plaintiff,

v.

U.S. TRUST COMPANY OF FLORIDA SAVINGS BANK,
as Personal Representative of The Estate of Mary Tarzian,

Defendant.

ENTRY ON DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND ALTERNATE MOTION FOR NEW TRIAL ON THE ISSUE OF LIABILITY

U.S. Trust Company of Florida Savings Bank, as personal representative of the Estate of Mary Tarzian (the "Estate"), has filed a Renewed Motion for Judgment as a Matter of Law and Alternate Motion for New Trial on the Issue of Liability. In its motion, the Estate argues the court should grant its Renewed Motion for Judgment as a Matter of Law under Fed.R.Civ.P. 50(a) for the following reasons: (1) there is no evidence that the Estate conferred actual authority upon its attorney, Mr. Pressley, to enter into a binding contract of

any type; (2) both parties expressly reserved the right not to be bound by an oral contract (i.e., no Type I agreement); (3) there were numerous open terms which were material (i.e., no Type I agreement); and (4) there was no agreement to continue negotiating in good faith (i.e., no Type II agreement). In the alternative, the Estate contends that it should be granted a new trial pursuant to Fed.R.Civ.P. 59 solely on the issue of liability for a Type I agreement.

The court, having thoroughly reviewed the Estate's motion, the supporting and opposing briefs, and the applicable law, now finds as follows: (1) there was sufficient evidence to support the jury's finding that Mr. Pressley had actual authority to bind the Estate; (2) there was sufficient evidence to support the jury's finding that the parties entered into a binding Type I agreement; and (3) there was sufficient evidence of a Type II agreement to be submitted to a jury. The court further finds that a new trial is not warranted on the issue of liability for a Type I agreement. The Estate's contention that by allowing the jury to consider the Type II claim caused the jury unnecessary confusion, is speculative at best, and is therefore insufficient to warrant a new trial. Accordingly, the Estate's Renewed Motion for Judgment as a Matter of Law and Alternate Motion for New Trial is hereby **DENIED**. *See Dunn* v. *Truck World, Inc.*, 929 F.2d 311, 313 (7th Cir. 1991) ("A district court need not write a comprehensive opinion explaining why it denied a motion for a new trial; indeed, the judge need not give an explanation of any kind."); *Gavoni* v. *Dobbs Houses, Inc.*, 1997 WL 639052 at *1 (N.D.Ill. Oct. 3, 1997) (Rule 59 motion requires "minimal discussion" where issues raised are a rehash of those previously rejected at trial).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Estate's Renewed Motion for Judgment

as a Matter of Law and Alternate Motion for New Trial is hereby **DENIED**.

IT IS SO ORDERED this 23rd day of June, 2003.

/s/ RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 99-165-C-Y/S

SARKES TARZIAN, INC.,

Plaintiff,

v.

U.S. TRUST COMPANY OF FLORIDA SAVINGS BANK,
as Personal Representative of The Estate of Mary Tarzian,

Defendant.

JUDGMENT

This cause having come to trial before the Court and the jury and the issues having been duly tried and the jury, having returned its verdict which verdict finds for the Plaintiff on its breach of a Type I contract claim, and reads as follows:

(H.I)

IT IS ORDERED that a judgment for the Plaintiff is hereby entered, with damages assessed against the Defendant in the amount of Four Million Dollars ($4,000,000.00).

Dated this 3rd day of February 2003.

/s/ Richard L. Young, Judge
United States District Court
Southern District of Indiana

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 99-165-C-Y/S

SARKES TARZIAN, INC.,

Plaintiff,

v.

U.S. TRUST COMPANY OF FLORIDA SAVINGS BANK,
as Personal Representative of The Estate of Mary Tarzian,

Defendant.

ENTRY ON STI'S MOTION FOR PARTIAL SUMMARY JUDGMENT and THE ESTATE'S MOTION FOR SUMMARY JUDGMENT

Sarkes Tarzian, Inc. ("STI") brings this lawsuit against U.S. Trust Company of Florida Savings Bank ("U.S. Trust"), as Personal Representative of The Estate of Mary Tarzian (the "Estate"). In Count I, STI alleges that the Estate entered into an oral agreement to sell 301,119 shares of STI common stock (the "Shares") to STI. STI alleges the Estate breached this agreement when it sold the Shares to another company. As an alternative theory, STI asserts that even if there was no oral agreement for the purchase and sale of the Shares, the Estate was bound by a mutual agreement to continue

negotiations in good faith. In Count II, STI alleges a claim for specific performance.

On April 23, 2001, both parties moved for summary judgment. STI moved for partial summary judgment on its claim that the parties were obligated to continue further negotiations in good faith. The Estate moved for summary judgment on STI's breach of contract claim as well as its good faith claim. For the reasons herein set forth, the court **DENIES** both parties' motions.

Subject matter jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332.

I. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). A genuine issue of material fact exists if there is sufficient evidence for a jury to return a verdict in favor of the non-moving party on the particular issue. *Methodist Medical Center* v. *American Medical Sec., Inc.*, 38 F.3d 316, 319 (7th Cir. 1994).

In considering a summary judgment motion, a court must draw all justifiable inferences in the light most favorable to the opposing party, and must resolve any doubt against the moving party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Bank Leumi Le-Israel, B.M* v. *Lee*, 928 F.2d 232, 236 (7th Cir. 1991); *Becker* v. *Tenenbaum-Hill Associates, Inc.*, 914 F.2d 107, 110 (7th Cir. 1990). While the burden rests squarely on the party moving for summary judgment to show "that there is an absence of evidence to support the nonmoving party's case," *Celotex Corp.* v.

Catrett, 477 U.S. 317, 325 (1986), the nonmoving party may not simply rest on the pleadings, but must affirmatively demonstrate by specific factual allegations that a genuine issue of material fact exists for trial. *Billups* v. *Methodist Hosp. of Chicago*, 922 F.2d 1300, 1302 (7th Cir. 1991). "The moving party is 'entitled to judgment as a matter of law' [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2253. However, if doubts remain as to the existence of a material fact, those doubts should be resolved in favor of the nonmoving party and summary judgment denied. *See Wolf* v. *City of Fitchburg,* 870 F.2d 1327, 1330 (7th Cir. 1989).

II. Facts

A. The Parties and Key Participants

The Seller's Side

1. Mary Tarzian founded SIT with her late husband, Sarkes Tarzian. ("Pressly Dep.") Ex. 12.

2. Mary Tarzian died on June 7, 1998. Pressly Dep. Ex. 12.

3. U.S. Trust is the personal representative of the Estate, and is the co-trustee of the Mary Tarzian Trust. (Plaintiff's Ex. 13, Mary Tarzian Trust Agreement; Pressly Dep. Ex. 14, First Amendment to Trust Agreement).

4. Patricia Tarzian, daughter of Mary Tarzian, is a co-trustee of the Trust and is a beneficiary of the Estate of the Trust. (Pressly Dep. Ex. 13; Pressly Dep. Ex. 14).

5. James G. Pressly, Jr. ("Pressly"), an attorney with the firm of Pressly & Pressly, P.A., in West Palm Beach, Florida, represented the Estate and the co-trustees of the Trust at all times relevant to this dispute. (Pressly Dep. at 4, 90).

6. Frank Tatum ("Tatum"), Myron Sugarman ("Sugarman"), and Webb Morrow ("Morrow"), lawyers with Cooley, Godward, LLP, in San Francisco, California, represent Patricia Tarzian in her individual capacity. (Affidavit of Frank Tatum ("Tatum Aff."), ¶ 2; Affidavit of Myron Sugarman ("Sugarman Aff."), ¶ 2; Affidavit of Webb Morrow ("Morrow Aff."), ¶ 2.

The Buyer's Side

7. Thomas Tarzian, son of Mary Tarzian, is the Chairman of STI. (Deposition of Thomas Tarzian ("T. Tarzian Dep.") at 3).

8. Herbert Camp ("Camp"), an attorney with Cravath, Swaine & Moore in New York, has represented STI for approximately 30 years. (Deposition of Herbert Camp ("Camp Dep.") at 3-4).

9. Valerie Carney ("Carney") is the general counsel of STI. (Deposition of Valerie Carney ("Carney Dep.") at 6-7).

B. The Shares

10. At the time of her death, Mary Tarzian owned 301,119 shares of the $4.00 par value common stock of STI (the "Shares"). (Amended Complaint, ¶ 2).

11. Pursuant to the terms of Mary Tarzian's will and trust documents, the Estate either had to sell the Shares within nine months of her death or disclaim any interest in the Shares, in which case the Shares would be distributed to the Mary Tarzian Charitable Foundation. (Pressly Dep. Ex. 12).

12. Thomas Tarzian owns 8% of the $4.00 par value common stock of STI, but retains 63.3% of the vote through his ownership of 100% of the $.40 par value common stock of STI. (Deposition of Frank Tatum ("Tatum Deposition") Ex. 62, Shareholders' Agreement).

13. If STI were to acquire the Shares, Thomas Tarzian's percentage of the $4.00 par value common stock would increase from 8% to 92%, thus increasing his equity holding from 20% to 93%. (Shareholders' Agreement, Tatum Dep. Ex. 62).

C. The Estate's Marketing of the Shares

14. On September 1, 1998, the Estate retained Frank Higney of Kalil & Company to assist the Estate in selling the Shares. (Pressly Dep. Ex. 15; Deposition of Frank Higney ("Higney Dep.") at 15-16).

15. From September 1, 1998 until January 28, 1999, the Estate actively sought a buyer for the Shares. (Deposition of Trobridge Calloway, III ("Calloway Dep.") Ex. 15; Pressly Dep. Ex. 15; Pressly Dep. at 112).

16. STI made no attempt to enter into negotiations or to purchase the Shares from the Estate from the time of Mary Tarzian's death in June 1998 until late January 1999. (Camp Dep. at 41, 60, 100; Camp Dep. Ex. 93).

17. During the time the Estate was attempting to market the Shares to third parties, STI, through Camp, insisted that the Estate inform all potential purchasers that:

    (1) the STI stock owned by Thomas Tarzian (which carries 63.3% of the total voting power and elects the entire Board of Directors of STI) is not for sale and is unlikely to be for sale in the foreseeable future;

    (2) STI does not currently pay dividends on its stock (and indeed STI's bank loan agreement prohibits dividends and redemptions), and has no present plan to pay dividends;

    (3) the Estate's STI stock carries only 33.5% of the total voting power and its holder is not entitled to a Board seat; and

    (4) STI does not intend to afford a buyer of the Estate's STI stock any special

arrangements, including to liquidity or an exit strategy.

(Pressly Dep. Ex. 23; Camp Dep. at 100; Camp Dep. Ex. 93).

D. The January 25 Meeting between the Estate and STI

18. On January 25, 1999, at STI's request, representatives of the Estate met with STI in New York City for a negotiating session. (Affidavit of James Pressly ("Pressly Aff.")).

19. Thomas Tarzian, Camp, and Carney attended the meeting in person as representatives of STI. (Camp Dep. at 4; Carney Dep. at 7; T. Tarzian Dep. at 40, 97).

20. Pressly attended the meeting in person as a representative of the Estate. (Pressly Dep. at 10).

21. Tatum, Sugarman, and Morrow attended the January 25 meeting by telephone for varying lengths of time as representatives of Patricia Tarzian. (Tatum Aff., ¶ 2; Sugarman Aff., ¶ 2; Morrow Aff., ¶ 2).

22. At the start of the January 25 meeting, Pressly read from his prepared notes as follows: "US Trust is standing by, is fully briefed and is prepared to sign a definitive Purchase & Sale contract today if we can negotiate one." (Pressly Dep. Ex. 28; Pressly Dep. at 181; Camp Dep. at 225; Carney Dep. at 216).

23. Pressly also announced that the Estate was awaiting an offer from a public company to purchase the Shares. (Carney Dep. Ex. 1;

Carney Dep. at 213-216; Pressly Dep. Ex. 28; Pressly Dep. at 184).

24. Specifically, Pressly was aware at the announcement of the meeting that a higher offer could be coming in from Bull Run Corporation ("Bull Run"), a former prospective purchaser. (Pressly Dep. at 176).

25. The Cooley Godward attorneys were involved in the negotiating session to represent Patricia Tarzian's interests in the event an agreement could be reached. (Tatum Dep. at 9-10).

26. Patricia Tarzian did not authorize Tatum or any other Cooley Godward attorney to enter into a contract with STI. (Tatum Aff., ¶ 4; Tatum Dep. at 104; Deposition of Patricia Tarzian ("P. Tarzian Dep.") at 29).

27. Carney began preparing the first version of a proposed written agreement during the January 25 negotiating session. (T. Tarzian Dep. at 88; Camp Dep. at 228; Carney Dep. at 293).

28. Camp, Carney, and Thomas Tarzian believed that an oral agreement was reached on all material terms during the January 25 negotiating session. (Camp Dep. at 155, 158, 210; Carney Dep. at 302; T. Tarzian Dep. at 109).

29. The parties agreed to certain of the terms of a purchase and sale proposal for the Shares: (1) the price for the Shares would be $4 million in cash and a $2 million note; and (2) the note would have a six-year term and bear interest at 7% per annum. (Pressly Dep. Ex. 28).

30. Pressly responded,[1] "This is not what we had in mind and I can't say we're happy with it, but we'll take it." (Pressly Dep. at 192, 254-255; Pressly Dep. Ex. 28).

31. At that point, Pressly testified that the parties had completed, as he termed it, "phase 1" of settlement negotiations—i.e., that the parties agreed to the amount of the settlement. (Pressly Dep. at 192).

32. The parties had not completed phase 2, which is where the parties go through a checklist of additional terms to determine whether to include them in the written documents. (Pressly Dep. at 193).

33. One reason the parties had not completed phase 2 of negotiations was because Pressly was concerned that a snowstorm might make it difficult for him to return home to Florida. Therefore, he suggested that Carney send out a draft "that evening by fax to California and Florida and * * * we would work through the terms of that the next day." (Pressly Dep. at 194-196).

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[1] Pressly notes reflect the following:
"This is not what we had hoped for and I can't say we're happy w/it, but we'll take it.

4M cash
2M notes
-6 years
-7%
- due on sale
- secured if Bank permits."

(Pressly Dep. Ex. 28).

34. Pressly then informed Toby Callaway ("Callaway") of U.S. Trust, after the negotiating session was concluded, "there will not be an agreement signed today and you're released from standing by." (Pressly Dep. at 189; Callaway Dep. at 33-34).

E. The Proposed Written Agreements

35. On January 25, 1999, STI sent the first version of the proposed written agreement ("Version One"), containing the terms agreed to by the parties above, to Pressly by facsimile. (Amended Complaint Ex. A).

36. STI, without having received any input from the Estate, sent a second version of the proposed written agreement ("Version Two") to Pressly by facsimile on January 27, 1999. (Amended Complaint, ¶ 13).

37. Version Two has attached to it a proposed form of a promissory note. (Amended Complaint Ex. B).

38. The Estate made no comments on Version One or Version Two of the proposed written agreement. (Carney Dep. at 300).

39. Both Version One and Version Two contain the following sentence:

> If the foregoing correctly sets forth our understanding, please so indicate by signing in the space provided below, whereupon this letter will become a binding agreement between us as of the Signing Date.
>
> (Amended Complaint, Ex. A and Ex. B).

40. Neither STI nor the Estate signed Version One or Version Two. (Amended Complaint, Ex. A and Ex. B).

F. The Sale to Bull Run

41. On January 28, 1999, the Estate entered into a contract with Bull Run wherein the Estate sold Shares to Bull Run for $10 million in cash. (Pressly Dep. Ex. 33).

42. That same day, Pressly, Camp, Carney and Tarzian had a telephone conference lasting 20 minutes during which Pressly informed STI that the Estate had sold the Shares to Bull Run. (Carney Dep. at 198; Carney Ex. 120; Camp Dep. at 210-211).

G. Open, Undecided and/or Undiscussed Terms

43. During the negotiating session, there was either no discussion or no agreement as to certain terms.[2] These included:

a. whether the promissory note would be non-negotiable (Tatum Dep. at 111; Sugarman Dep. at 137);

b. a waiver of a pre-payment penalty (Carney Dep. at 222, 299; Camp Dep. at 206; Tatum Dep. at 110; Sugarman Dep. at 135);

[2] The court did not include those terms which the parties dispute, such as whether the promissory note would be secured, whether the Estate would indemnify STI for estate taxes, and what state's law would apply.

c. an attorney's fee clause (Carney Dep. at 301; T. Tarzian Dep. at 152);

d. a choice of law clause (Carney Dep. at 218; T. Tarzian Dep. at 116-117);

e. a firm closing date (Camp Dep. at 137; Carney Dep. at 220, 222; T. Tarzian Dep. at 135);

f. release provisions (Camp Dep. at 185-186; T. Tarzian Dep. at 142: Tatum Dep. at 108; Sugarman Dep. at 130); and

g. how the Shares would be delivered (Sugarman Dep. at 134).

44. During the negotiating session, there was no discussion about STI and the Estate discussing or entering into an agreement to continue negotiations. (Sugarman Dep. at 138; Pressly Aff., ¶ 3).

III. Discussion

A. Preliminary Agreements

The Second Circuit[3] recognizes that in certain rare circumstances preliminary manifestations of assent requiring further negotiations create binding obligations. *Shann* v. *Dunk*, 84 F.3d 73, 77 (2nd Cir. 1996). Such "binding preliminary contracts" fall into two categories. *See Teachers Ins. and Annuity Ass'n of America* v. *Tribune Co.*, 670 F.Supp. 491, 497-99 (S.D.N.Y. 1987).

> Type I is where all essential terms have been agreed upon in the preliminary contract, no

[3] Both parties utilized New York law in their briefs.

> disputed issues are perceived to remain, and a further contract is envisioned primarily to satisfy formalities. Type II is where the parties recognize the existence of open terms, even major ones, but, having agreed on certain important terms, agree to bind themselves to negotiate in good faith to work out the terms remaining open. In Type II agreements, the parties do not bind themselves to conclude the deal but only to negotiate in good faith toward conclusion within the agreed framework.

Shann, 84 F.3d at 77.

A Type I agreement is otherwise referred to as a "preliminary binding agreement." If the parties enter into a preliminary binding agreement, the parties are bound to carry out the terms of the agreement even if the agreement is never reduced to writing. *Adjustrite Sys.* v. *GAB Bus. Serv., Inc.*, 145 F.3d 543, 548 (2nd Cir. 1998). A Type II agreement is otherwise referred to as a "preliminary binding commitment." If the parties enter into a preliminary binding commitment, the parties are bound only to negotiate the terms in good faith. *Id.* No agreement need be reached. *Id.*

The key to determining whether a preliminary agreement exists is the intent of the parties, i.e., whether the parties intended to be bound and, if so, to what extent. "To discern that intent a court must look to 'the words and deed [of the parties] which constitute objective signs in a given set of circumstances." *Id.* at 549 (quoting *Winston* v. *Mediafare Entertainment Corp.*, 777 F.2d 78, 80 (2nd Cir. 1986)). Subjective evidence of intent is not to be considered. *See Rule* v. *Brine, Inc.*, 85 F.3d 1002, 1010 (2nd Cir. 1996).

B. Type I Agreement

The Estate moves for summary judgment on STI's claim that it and the Estate entered into a binding preliminary

agreement. The parties' intention to be bound by a binding preliminary agreement is determined by examining: "(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing." *Adjustrite*, 145 F.3d at 549. The first factor is the most important. *Arcadian Phosphates, Inc.* v. *Arcadian Corp.*, 884 F.2d 69, 74-76 (2nd Cir. 1989).

With regard to the first factor, the Estate's position is that the parties did not enter into a preliminary binding agreement because the parties did not intend to be bound unless and until the agreement was reduced to writing. Because the court finds a material issue of fact on this factor, the court will not address the remaining three factors.

Under New York law, "if parties do not intend to be bound by an agreement until it is reduced to writing and signed, then there is no contract until that occurs." *R.G. Group, Inc.* v. *Horn & Hardart Co.*, 751 F.2d 69, 74 (2nd Cir. 1984). This is true "even if the parties have orally agreed upon all the terms of the proposed contract." *Id.* (citing *Schwartz* v. *Greenberg*, 304 N.Y. 250, 107 N.E.2d 65 (1952)). "On the other hand, where there is no understanding that an agreement should not be binding until reduced to writing and formally executed, and '[w]here all the substantial terms of a contract have been agreed on, and there is nothing left for future settlement,' then an informal agreement can be binding even though the parties contemplate memorializing their contract in a formal document." *R.G. Group*, 751 F.2d at 74 (citing *Municipal Consultants & Publishers, Inc.* v. *Town of Ramapo*, 390 N.E.2d 1143, 1145 (1979)).

Both the first and second versions of the proposed written agreement, as drafted by STI, contain this concluding paragraph:

> If the foregoing correctly sets forth our understanding, please so indicate by signing in the space provided below, whereupon this letter will become a binding agreement between us as of the Signing Date.

Moreover, Thomas Tarzian testified that "whatever came out of [the negotiations] would be memorialized and reduced to writing." (T. Tarzian Dep. at 109).

The Estate argues that the very language of the proposed versions drafted by STI reveals that it did not intend to be bound absent its signature on the written agreement. *See R.G. Group*, 751 F.2d at 75 (a mutual intent not to be bound prior to execution of formal documents is "conclusively established" when neither party takes exception "over the course of bargaining, to provisions in the drafts * * *"). In addition, they argue that the proposed agreement's language is consistent with Thomas Tarzian's testimony that he always intended for the result of the negotiating session to be reduced to writing. Finally, the Estate argues that Pressly had no authority to enter into a contract on behalf of the Estate and that he so informed the participants at the commencement of the January 25 meeting.

STI's position is that the parties had a firm deal on the evening of January 25, and that the language of the proposed agreement relied upon by the Estate is not evidence to the contrary. In fact, they argue that far from negating the possibility of an oral agreement, both versions of the proposed written agreement stated that it would "supercede[] any and all prior conversations, agreements or understandings between the parties pertaining to this subject matter" and that this would not occur until the proposed

written agreement was signed by the parties. Next, STI argues that Thomas Tarzian's testimony that he expected the agreement to be in writing did not mean that the parties did not have an agreement until it was in writing; instead, he meant that the parties' agreement would be memorialized in a separate writing. Further, STI retorts that Pressly did *not* inform the parties that he had no authority to bind the Estate; instead, he testified that U.S. Trust was standing by and prepared to sign a definitive purchase agreement if the parties could negotiate one. STI maintains that while Pressly did not have actual authority to bind the Estate, he certainly had apparent authority. And finally, in response to Pressly stating, "This is not what we had in mind and I can't say we're happy with it, but we'll take it," (Pressly Dep. Ex. 28), Thomas Tarzian said: "[W]e do have a deal, right. And Mr. Pressly said yes, we have a deal. He then shook hands again. We all shook hands." (Camp Dep. at 229).

Viewing the evidence in the light most favorable to STI, the court finds a material issue of fact exist as to whether the parties intended to be bound by the terms agreed upon during the January 25 meeting, and that the requirement of a writing was a mere formality. Accordingly, the court **DENIES** the Estate's Motion for Summary Judgment on the issue of whether the parties entered into a preliminary binding agreement.

C. Type II Agreement

STI and the Estate move for summary judgment on STI's claim that STI and the Estate entered into a binding preliminary commitment. Determining the parties' intention to be bound by a preliminary binding commitment requires consideration of the four factors listed above, along with one additional factor, the context of the negotiations. *Teachers*, 670 F.Supp. at 498-500. Once again, the first of the five factors carries the most weight. *Arcadian Phosphates*, 884 F.2d at 72.

In applying the factors listed above to this case, the court need look no further than the first factor, as there is an issue of fact as to whether the parties intended to be legally bound to negotiate further in good faith. It is undisputed that Pressly said "we'll take it." It is also undisputed that Pressly indicated that there would be further negotiations the following day after the receipt of the written draft. The crux of the parties' dispute is the proper interpretation to be given Pressly's words. That is not for this court to decide. *Burger King Corp.* v. *Horn & Hardart Co.*, 893 F.2d 525, 529 (2nd Cir. 1990) (evidence of intent not appropriate for court to resolve at summary judgment stage). Accordingly, the court **DENIES** STI's Motion for Partial Summary Judgment and the Estate's Motion for Summary Judgment on the issue of whether the parties entered into a preliminary binding commitment.

IV. Conclusion

For the reasons stated above, the court **DENIES** STI's Motion for Partial Summary Judgment and the Estate's Motion for Summary Judgment.

SO ORDERED this 28th day of February 2002.

/s/ RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 21, 2005

Before

Hon. Michael S. Kanne, *Circuit Judge*

Hon. Terrence T. Evans, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

Nos. 03-2994 & 03-3098

Sarkes Tarzian, Inc., *Plaintiff-Appellee-Cross-Appellant* v. U.S. Trust Company of Florida Savings Bank, *Defendant-Appellant-Cross Appellee.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division No. 99 C 165 Richard L. Young, *Judge*

ORDER

Plaintiff's Petition for Rehearing and Rehearing En Banc was filed in this case on February 28, 2005. The panel voted unanimously to deny rehearing. The petition for rehearing is DENIED. No judge has requested a vote on the petition for

rehearing en banc.[1] Accordingly, this petition is also DENIED.

SO ORDERED.

[1] The Honorable Ilana Diamond Rovner did not participate in the consideration of this case.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 99-165-C-Y/S

SARKES TARZIAN, INC.,

Plaintiff,

v.

U.S. TRUST COMPANY OF FLORIDA SAVINGS BANK,
as Personal Representative of The Estate of Mary Tarzian,

Defendant.

VERDICT FORM

Type I Agreement

1. Did the Estate and STI enter into a Type I Agreement as described in Final Instruction No. 22?

   Yes _X_ No ___

   If your answer is "yes," please go to Question 2.

   If your answer is "no," please date and sign the Verdict Form and go to Question 4.

2. Did the Estate breach the Type I Agreement?

   Yes _X_ No ___

   If your answer is "yes," please go to Question 3 and do not answer Questions 4, 5, or 6.

   If your answer is "no," please date and sign the Verdict Form and go to Question 4.

3. What damages should be awarded to STI as a result of the Estate's breach of the Type I Agreement?

   $ 4,000,000 (4 million)

/s/ Dated: 2/3/03

Foreperson

VERDICT FORM

Type II Agreement

4. Did the Estate and STI enter into a Type II Agreement as described in Final Instruction No. 25?

   Yes ___ No ___

   If your answer is "yes," please go to Question 5.

   If your answer is "no," please date and sign the Verdict Form.

5. Did the Estate breach the Type II Agreement?

   Yes ___ No ___

   If your answer is "yes," please go to Question 6.

   If your answer is "no," please date and sign the Verdict Form.

6. What damages should be awarded to STI as a result of the Estate's breach of the Type II Agreement?

   $_____

   /s/ Dated: 2/3/03

   Foreperson

(2)

No. 04-1712

Supreme Court, U.S.
FILED
AUG 22 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SARKES TARZIAN, INC.,

Petitioner,

v.

US TRUST COMPANY OF FLORIDA SAVINGS BANK,
as personal representative of the estate of Mary Tarzian,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

U.S. Trust Company of Florida Savings Bank, n/k/a U.S. Trust Company, N.A., is a wholly owned subsidiary of U.S. Trust Corporation, a New York corporation, which is a wholly owned subsidiary of The Charles Schwab Corporation, a Delaware corporation (NYSE Symbol: SCH), a publicly traded company.

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INTRODUCTION

There is no reason for this Court to review the judgment of the Seventh Circuit in this case. This state law breach of contract claim was brought in federal court based solely on diversity of citizenship. This case, although very significant to these parties, only affects these parties.

The substantive issues in this case are governed by New York law. The claim is for breach of an alleged oral contract between U.S. Trust, as personal representative of an estate, and STI, a closely held Indiana corporation. U.S. Trust owned the majority equity interest in STI, and had been in negotiations for STI to repurchase the shares. Believing that there was no binding contract between it and STI, U.S. Trust sold the shares to a higher bidder. The primary issue in dispute was whether the parties formed a binding oral contract.

There were a number of reasons why U.S. Trust did not believe a fully binding oral contract was formed between it and STI. Without specifically addressing all of those reasons, a Panel of the Seventh Circuit found one of the issues to be dispositive in favor of U.S. Trust. In reaching its judgment, the Seventh Circuit Panel reviewed an extensive trial court record from a six-day trial; analyzed the complex but well-established New York law which governs this contract dispute; and heard oral argument which focused squarely on the issue of the authority, or lack thereof, of U.S. Trust's attorney to enter into a binding oral contract without any consultation with U.S. Trust's principals.

In a detailed and well-reasoned opinion, the Panel concluded unanimously that STI failed to prove that U.S.

Trust's attorney, James Pressly, had authority to enter into an oral contract on behalf of U.S. Trust. STI, as the party seeking to enforce the alleged contract, had the burden to prove that Pressly had authority and could not maintain its claim without a favorable finding on that issue. STI failed to prove its claim and judgment was entered in favor of the Estate, as required by Rule 50 of the Federal Rules of Civil Procedure.

STI then filed a motion for rehearing and rehearing en banc in the Seventh Circuit. After full briefing, the original Panel denied the motion for rehearing, again unanimously, and none of the active judges sought a vote in favor of rehearing this case en banc. Thereafter, the mandate issued, directing the district court to enter judgment for U.S. Trust. STI then moved in the district court for a new trial, as noted in its Petition. That motion has been denied. (Respondent's Appendix 1a) STI, in addition to filing its Petition here, filed a second appeal to the Seventh Circuit challenging the order denying its new trial motion. That appeal is pending.

Obviously, this case is very important to STI, and has equal importance to U.S. Trust. However, this case has no importance beyond these parties. This case raises no federal constitutional or statutory issue. Notwithstanding that, STI now wants this Court to review the extensive trial court record and undertake an exhaustive analysis of New York state law in the hope that this Court might disagree with the result reached by the Seventh Circuit. This Court's discretionary jurisdiction generally is not exercised to review the correctness of discrete state-law decisions by circuit courts or to weigh justice among contesting parties.

In an effort to justify the filing of its Petition, STI suggests that the Seventh Circuit decision conflicts with the decisions of other circuits on the province of a jury in a federal civil trial. In doing so, STI focuses on one small part of the opinion below in which the court rejects STI's argument that *Carter v. Chicago Police Officers*, 165 F.3d 1071, 1075 (7th Cir. 1998), an earlier decision by the same court, permits the jury to parse the facts, weigh the credibility of witnesses and disregard testimony which is not credible or believable. (Petitioner's Appendix at 13a-14a) *Carter* has nothing to do with this case because in *Carter* there were two distinct and inconsistent versions of the facts before the court. In contrast, in this case there is no conflicting testimony:

> even viewed in the light most favorable to STI, the evidence STI points to is not inconsistent with Mr. Callaway and Ms. Cavanaugh's testimony about the scope of Mr. Pressly's authority, namely that Mr. Pressly was authorized to negotiate a deal but not to sign a contract or otherwise bind U.S. Trust without consulting it first.

(Petitioner's Appendix at 14a)

There is no recurring problem with district courts or circuit courts invading the province of the jury. STI in its Petition laments the loss of its jury verdict in this case, as well as the decline of jury trials in general.[1] There is nothing

1. When the Federal Rules of Civil Procedure were enacted in 1938, among the primary justifications and goals was to reduce the number of trials by creating open and full discovery, so that the parties and their attorneys would be in a better position to evaluate the merits (Cont'd)

wrong with the jury trial system in general and nothing wrong with the manner in which various circuit courts treat Rule 50 motions.

The cases STI claims are in conflict are easily reconcilable. Each case can fit into one of the following two categories, without regard to whether the witness is interested or disinterested:

- if there is a legally sufficient evidentiary basis for a reasonable jury to find for a party on a particular issue, that issue is decided by a jury, and the jury alone decides which witnesses to believe and what weight to give to the evidence.

- if the party with the burden of proof fails to present legally sufficient evidence, the court enters judgment as a matter of law, without judging the credibility of any witness and without weighing the evidence.

In either event, juries do not decide what the law is, nor do juries decide whether the evidence, taken in a light most

(Cont'd)

of their cases and reach informed settlements, and by providing a mechanism for summary dispositions by the courts when there are no disputed factual issues. Stephen Subrin, *Fishing Expedition: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 716 (1998). In complaining that there are less jury trials now, STI in essence is complaining the rules and this Court's jurisprudence (*i.e.* the trilogy of summary judgment cases from 1986) have accomplished their intended purpose. The entire system should not be changed simply because STI is unhappy with the result in this case.

favorable to the plaintiff, is legally sufficient under the applicable state law. It is that simple and straightforward.

Moreover, this case does not provide the right opportunity to clarify the law because the result here is not based on any of the federal procedural cases cited by STI. Instead, the result depends on the threshold determination whether the evidence STI presented was legally sufficient under New York law to permit a reasonable jury to find for STI. Before this Court could reach the merits of any procedural conflict (if one existed), the Court first would have to review the extensive factual record and the applicable New York law and determine that the evidence STI presented was legally sufficient.

In sum, this case is simply a decision on a breach of contract case under state law. It does not merit certiorari review.

REASONS FOR DENYING THE PETITION

I. THERE IS NO MEANINGFUL CONFLICT IN HOW THE CIRCUITS TREAT TESTIMONY OF WITNESSES, WHETHER INTERESTED OR DISINTERESTED, IN DECIDING A RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW.

Despite STI's effort to make it so, this case has nothing to do with whether the testimony of an interested witness should be more easily disregarded or given less weight than the testimony of a disinterested witness for the purposes of a Rule 50 motion. Indeed, when deciding a Rule 50 motion, whether it be the trial judge during the trial or a panel of appellate judges reviewing the issue *de novo*, the court cannot